SUPREME JUDICIAL COURT
COMMONWEALTH OF MASSACHUSETTS

SJC NO. DAR-25545

APPEALS COURT NO. 2017-P-0950

G4S TECHNOLOGY LLC
Plaintiff/Appellant

v.

MASSACHUSETTS TECHNOLOGY PARK CORPORATION
Defendant/Appellee

ON DIRECT APPELLATE REVIEW OF A
FINAL JUDGEMENT OF THE SUPERIOR COURT

SUBSTITUTE APPLICATION FOR DIRECT APPELLATE REVIEW
G4S TECHNOLOGY LLC

Christopher Weld, Jr.(BBO# 522230)
cweld@toddweld.com
Megan C. Deluhery (BBO# 655564)
mdeluhery@toddweld.com
Maria T. Davis (BBO# 675447)
mdavis@toddweld.com
TODD & WELD LLP
One Federal Street, 27th Floor
Boston, MA 02110
(617) 720-2626

Joel Lewin (BBO# 298040)
jlewin@hinckleyallen.com
Rhian M.J. Cull (BBO# 662035)
rcull@hinckleyallen.com
Hinkley Allen & Snyder, LLP
28 State Street
Boston, MA 02109
(617) 345-9000

Dated: August 14, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

i. Request for Direct Appellate Review

The plaintiff below and appellant here, G4S Technology LLC ("G4S"), respectfully requests that this Honorable Court grant direct appellate review of and reverse the decisions by the Suffolk Superior Court Business Litigation Session (Sanders, J.), denying G4S's motion to amend its Complaint and allowing Massachusetts Technology Park Corporation's ("MTPC") motion for summary judgment as to G4S's Complaint. A copy of those opinions are attached hereto as Exhibit 1 and Exhibit 2, respectively, and a certified copy of the docket reflecting that final judgment has entered is attached as Exhibit 3.

As addressed in greater detail below, this case involves a multi-year installation of a 1200-mile fiber optic network in western Massachusetts for a contract price of $47.2 million (the "Project"). G4S served as the Design-Builder for the Project, which was completed January 20, 2015 when MTPC issued a "Certificate of Final Completion of Work." MTPC owns the network, which is currently in use to the benefit of businesses and residents throughout western Massachusetts.

During the course of the Project, there were delays, and the parties have long disputed who was at fault. Ultimately, MTPC refused to pay $4 million of the contract price to G4S on approved invoices,

alleging G4S was responsible for delays and defective workmanship worth that amount. G4S filed suit to recover this sum plus $10 million more for costs of completion and damages due to MTPC's alleged delays.

A year into litigation, MTPC decided it had found a way out. Rather than prove that G4S, not the agency, was responsible for delays, and rather than prove the claimed defective workmanship, MTPC successfully obtained judgment arguing that because G4S had intentionally breached contract provisions relating to timely subcontractor payments and certifications[1], G4S could not advance a claim in contract or *quantum meruit*—it forfeited its rights and could recover nothing. By the time MTPC sought this relief, G4S's alleged breach was cured: everyone had been paid in full. Yet, based on the decisions below, MTPC has received the benefit of the completed Project, including full payment by G4S of all subcontractors, but G4S has no right to seek recovery of a $4 million contract balance and a $10 million delay claim.

MTPC argued below, and the trial court agreed, that this outcome was dictated by the rule of Sipley v. Stickney, 190 Mass. 43, 48(1906), Andre v. Maguire, 305 Mass. 515, 516 (1940) and their progeny, which hold that any breach of a construction contract bars

[1] G4S paid over 7,500 invoices from consultants, vendors and subcontractors on this three-year Project.

recovery under the contract, and a recovery in *quantum meruit* cannot be had where a willful breach is not *de minimis*. These cases, which pre-date adoption of the modern materiality rule, set out most succinctly in the Restatement (Second) of Contracts, § 237 (1981), should not control the outcome here. Indeed, Massachusetts courts have applied the materiality rule in commercial contexts to determine whether and to what extent a plaintiff's own failure to perform a term of the contract should bar its ability to recover under the contract for defendant's breach: only where the plaintiff's own non-performance is *material* and uncured (or uncurable) will it excuse the defendant's performance. See *infra* at 13-16. Yet, there appears an anomaly in the law where this basic concept is rarely applied in construction contract disputes.

Construction contracts present no unique concerns that warrant taking them out of application of the modern rule, and in fact, consistently applying the materiality rule to construction contract disputes will provide parties with more certainty in their dealings than can be gleaned from the current state of the law. Some cases, like the trial court's decision below and a recent Appeals Court 1:28 decision, Pinecone Construction v. Sridar, 91 Mass. App. Ct.

1125 (June 1, 2017)[2], rely on and apply the rule of Sipley and Andre to bar recovery in contract where there is any contractual deviation without considering its materiality. By contrast, at least one other construction case recently applied the materiality rule in determining that an intentional breach by the subcontractor should not deprive it of the right to contractual performance because it was not material. See Certified Power Sys., Inc. v. Dominion Energy Point, LLC, Nos. BRCV2008-1217, BRCV 2008-01114, BRCV 2008-1198, BRCV 2009-292, 2012 WL 384600, at *63 n.45, *64-65 (Mass. Super. Ct. Jan. 3, 2012) (intentionally falsified lien waivers submitted to induce payments did not constitute material breach).

Further, this case brings into conflict two basic contract principles: 1) the forfeiture rule from Sipley and its progeny, and 2) the rule that a party to a contract should receive the benefit of the bargain, but no more, if there is a breach. See e.g., Ficara v. Belleau, 331 Mass. 80 (1954). MTPC got its Project, worth $47-$57 million; citizens can use the network; all subcontractors were paid. The damage MTPC suffered as a result of G4S's breach, if any, is far less than the windfall MTPC has received here. In

[2] This Rule 1:28 decision followed a bench trial that had resulted in final judgment awarding the contractor a *quantum meruit* recovery. The property owners proceeded *pro se* at trial and on appeal.

fact, the record at the time G4S's claims were dismissed did not quantify any harm MTPC suffered—and the lack of evidence of any harm in the record only underscores that the remedy MTPC obtained was well beyond the benefit of the bargain. Further, the record at the time of the trial court's decision suggested that MTPC knew or should have known of the breaches long before raising them in this litigation; having failed to take timely action, it waived the breach. Surely the law of the Commonwealth will not countenance this result. Given the substantial implication of the trial court's decision on both private and public construction projects in the Commonwealth, the surety industry, not to mention these parties, this Court is respectfully asked to accept direct appellate review of this matter to decide: (1) whether the Sipley and Andre rule should continue to apply in construction contract disputes to bar recovery under the contract for any non-performance of any degree, or whether the modern materiality rule should be applied to allow a contractual recovery for non-material breaches; (2) whether a forfeiture rule which overcompensates the non-breaching party should be countenanced in these circumstances; (3) whether a contractor who fully performs the physical work and cures any non-material breach can be denied recovery even under *quantum*

meruit; and (4) whether the trial court erred on the record before it in deciding as a matter of law that any breach by G4S was not *de minimis* or otherwise excused by MTPC.

ii. Prior Proceedings

On September 22, 2014, G4S filed its Complaint against MTPC, pleading claims of breach of contract and warranty as a result of MTPC's refusal to pay G4S $14,030,647 under the Contract. Exhibit 3 (Docket), #1. On October 26, 2015, during discovery, G4S sought to amend its Complaint, to assert a claim for recovery in *quantum meruit*; MTPC opposed that motion. Id., #38.

Shortly afterwards, on November 10, 2015, MTPC filed its motion for summary judgment, seeking dismissal of G4S's breach of contract and breach of warranty claims. Id., #39. MTPC also moved for summary judgment on its counterclaims under G.L. c. 93A and for fraud. Id. G4S opposed the motion and filed an application under Mass. R. Civ. P. 56(f) seeking additional discovery. Id., #42. On March 30, 2016, the trial court entered an order allowing MTPC's motion for summary judgment as to G4S's claims based on G4S's breaches of the Contract, denying G4S's motion to amend as futile, and denying MTPC's motion for affirmative judgment on its counterclaims. Id., #49. In denying the motion as to MTPC's counterclaims, the trial court reasoned that although the record showed

an "intentional breach" of the Contract in the submission of false payment certifications, MTPC had not shown this conduct was "material" as required to prevail on its fraud claim.[3] The trial court observed that MTPC offered no evidence of any damage it had suffered in connection with the payment certifications. See Ex. 2, at 12.

In late 2016, MTPC again moved for summary judgment on its counterclaims for fraud and violations of G.L. c. 93A. See Ex. 3, #54. MTPC asserted in its motion that it would not pursue its remaining claims. G4S opposed the motion by arguing MTPC was barred from pursuing a damages remedy having already received, through forfeiture, a multi-million dollar remedy, among other arguments.[4] G4S also filed its own motion

[3] The trial court also raised doubts that MTPC—a public agency—was engaged in trade or commerce and entitled to pursue a 93A claim.

[4] After MTPC served a Rule 56 motion seeking damages to compensate for the same breach for which it had obtained forfeiture, G4S requested a status conference with the trial court. After that conference, the court agreed that G4S should not respond to factual assertions about each of the 1800+ invoices alleged to have been paid late, but instead, that it should brief, and the court would address, threshold issues first. G4S would be able to respond on each invoice at a later date, if the threshold issues were not dispositive. The trial court denied MTPC's motion based on these threshold issues; therefore, G4S has never had to submit facts to dispute the assertions that 1800+ invoices were paid some number of days late to various third parties (including MTPC)—although G4S had begun the analysis, provided MTPC with some facts in response to a prior motion MTPC withdrew, and

for summary judgment with regard to MTPC's claims for violations of G.L. c. 93A and indemnification.

On January 30, 2017, the Superior Court entered an order denying MTPC's motion for summary judgment, and allowing G4S's motion. Id., #58. On March 6, 2016, the Court dismissed MTPC's remaining claims without prejudice, and on March 30, 2016, final judgment entered. Id., #65. G4S filed a timely notice of appeal, and MTPC filed a notice of cross-appeal. Id., #66-67. The appeal was docketed on July 21, 2017.

iii. Summary of the Facts

A. The Parties' Contract

On June 30, 2011, MTPC entered into a contract with G4S (the "Contract"), pursuant to which G4S was to design and build the Project. The Contract price was $47,223,291.30, "subject to adjustments made in accordance with the General Conditions of the Contract." Exhibit 4 (Contract excerpts), Art. 5.1. The Contract consists of numerous components, including the cover agreement, general conditions, and many exhibits. The Contract is over 450 pages long.[5]

G4S was to submit periodic invoices as the project progressed. MTPC was required to "approve or

---

believes many of those late payment allegations will be disputed. The full record of which invoices were indisputably late is not part of the record on appeal.

[5] This includes exhibits, such as the general conditions, but excludes amendments/change orders.

reject, in whole or in part" the invoices and then to pay as approved. Id., at 6.1.2. Each time G4S submitted an invoice, it also submitted to MTPC a progress payment release ("PPR"), which, in Section E, required G4S to certify that all invoices of subcontractors and suppliers then due both (a) *had been paid* and (b) *would be paid* from the requested MTPC payment.[6] Id., Ex. B-1. The Contract allowed MTPC to take over payment of subcontractors if G4S failed to cure untimely payment practices, but MTPC still had to pay G4S all undisputed amounts due. Id., Ex. A, Art. 10.2.1, 10.2.3; G.L. c. 30, §39G (incorporated into Contract at Ex. F, at 7, 11-13).

The payment process was complex. G4S retained numerous subcontractors and consultants on the Project and ultimately paid over 7,500 invoices over the three-year term of the work. Exhibit 5 (excerpts of 2015 9A(b)(5) statement ("SMF")), ¶148. G4S was required to, and did, obtain releases from subcontractors in connection with its invoices to MTPC. Id. at ¶158. MTPC hired its own consultant who

[6] There is an inherent ambiguity in the PPR language, which appears to require the impossible: that G4S both assure MTPC that (a) all subcontractor invoices had been paid and (b) that those same invoices would be paid from the invoiced payment after receipt from MTPC. MTPC relied on a variety of documents and testimony to contend that G4S intentionally withheld payments near the end of fiscal quarters to improve its financials.

spent 18 hours per month reviewing G4S's invoices. Exhibit 6 (Affidavit of Steven Wengert), ¶8.

The Project was to be funded in substantial part from a grant MTPC received from the U.S. government, under the American Recovery & Reinvestment Act, with the remainder of the price paid from state funds. See Ex. 5 (SMF), ¶1. MTPC had to use the federal funds for the Project, and it could only seek an advance for 30 days of expenses. See Exhibit 7 (excerpted Award conditions); Ex. 5 (SMF), ¶1. The state funds were also intended to be used for the Project. Ex. 5, ¶1.

B. The Project and Subcontractor Payments

G4S paid, in full, all third-party invoices by the time of the issuance of the Certificate of Final Completion. See Ex. 5 (SMF), ¶¶143, 148, 190. The agreed-upon timeframes for payment of invoices varied, and the factual record before the trial court showed that the document relied upon by MTPC as definitive (Ex. 209) did not, in fact, accurately reflect the individual payment terms. Id. at ¶¶149, 152. The trial court determined that the record showed some subcontractors were not timely paid, and so some PPRs were known to be false when submitted: an intentional breach. See Ex. 2, p. 8. At the time of summary judgment, there was no evidence that these payment issues harmed MTPC or caused delays on the Project.

See Ex. 5 (SMF), ¶¶144-145. Subcontractors provided periodic and final releases. Id. at ¶¶158-160.

As was its right, MTPC notified G4S that it was withholding over $4 million of the original contract price based on alleged delays (per a liquidated damages provision) and costs of correcting workmanship issues. See Exhibit 8 (excerpted 2016 9A(b)(5) statement), ¶103. It also refused to compensate G4S for an additional $10 million that G4S claimed for completing the Project, in response to G4S's final invoice. Id. at ¶¶104-105. MTPC did not identify PPRs or untimely subcontractor payments as a basis for withholding these funds. Id. at ¶103.

iv. Statement of the Issues on Appeal

There are several issues presented in this appeal, which were adequately preserved below.[7] Without limiting a full presentation of issues in a final brief, the primary issues are these: (1) Whether it was error to apply the rules of Sipley and Andre, as opposed to the materiality rule of §237 of the Restatement, to bar G4S from pursuing recovery under the contract due to an alleged breach concerning subcontractor payments and payment certifications, where the alleged breach by G4S was not material or,

[7] MTPC has filed a notice of cross-appeal relating to the denial of its effort to obtain a damages recovery for the same conduct for which it obtained forfeiture.

if so, was cured before G4S sought final payment from MTPC; (2) Whether it was error to permit a windfall recovery through forfeiture which violates the basic contract rule that a party cannot receive more than the benefit of the bargain; (3) Whether it was error to deprive G4S of an ability to recover in *quantum meruit* under J.A. Sullivan Corp. v. Commonwealth, 397 Mass. 789 (1986) where the record shows that G4S substantially performed in good faith, any deviation from the strict requirements regarding subcontractor payments/PPRs was *de minimis*, and G4S's conduct was excusable or excused by MTPC; and (4) Whether it was error to grant summary judgment to MTPC where disputes of fact and an underdeveloped record did not permit the trial court to determine whether the alleged breach by G4S was either material or *de minimis* and inconsistent with good faith substantial performance.

v. Argument

As the trial court has observed since the March 2016 ruling, the law applied to forfeit G4S's claims is quite old and in this case led to a harsh result.[8] G4S should not be barred from presenting the merits of its claims to $14 million where it completed, and MTPC accepted, the Project.

[8] See Exhibit 9 (excerpted 9/27/16 hearing transcript) at p. 23.

First, it was error for the Court to dismiss G4S's contract claims without engaging in a materiality analysis as set out in the Restatement (Second) of Contracts §§237, 241. These sections, published in 1981, reflect a rule often applied in Massachusetts cases. See Quirk v. Mass. Dept. of Envtl. Prot., 62 Mass. App. Ct. 1102, *2-3(2004) (Rule 1:28 decision) (citing Restatement §241 in evaluating whether alleged breach of settlement agreement was material); Protege Software Servs., Inc. v. Colameta, 30 Mass. L. Rptr. 127, *7-8 (Mass. Super. Ct. Jul. 16, 2012) (analyzing whether employer's conduct was "material breach" that discharged employee's obligations, citing §241); O'Connell Mgmt. Co., Inc. v. Carlyle-XIII Managers, Inc., 765 F. Supp. 779, 783 (D. Mass. 1991) (citing Petrangelo v. Pollard, 356 Mass. 696, 701-702 (1970); Quintin Vespa Co. v. Constr. Serv. Co., 343 Mass. 547, 554 (1962); Ward v. Am. Mut. Liab. Ins. Co., 15 Mass. App. Ct. 98, 100 (1983)) ("It is well-settled that an uncured, material breach by one party excuses the other party from further performance under the contract."); Noonan v. Wonderland Greyhound Park Realty LLC, 723 F. Supp. 2d 298 (D. Mass. 2010) (quoting Coviello v. Richardson, 76 Mass. App. Ct. 603 (2010)) (evaluating whether "material breach of [intercreditor and subordination agreement] by one party excuses the other party from

performance as a matter of law"). Nonetheless, the rule is rarely cited and applied to construction contract disputes, resulting in one set of contract rules for construction law (often), and another set for all other contracts. Application of the materiality rule here would require reversal of the judgment dismissing G4S's contract claim.

A material breach involves an "essential and inducing feature of the contract." Lease-It, Inc. v. Mass. Port Auth., 33 Mass. App. Ct. 391, 396 (1992). "Whether a breach is material or immaterial normally is a question for the jury to decide." Id. The Restatement creates no *per se* exception for an intentional breach; the focus in contract is whether the breach was material. Moreover, under §237 a material breach only excuses the other party's performance if it is incurable or not cured. Here, any payment issues were curable, and cured, by G4S. See supra 9-10. Before submitting its final invoice, G4S had paid all subcontractors in full, although G4S had a multi-million dollar invoice outstanding with MTPC.

Restatement §241 sets out factors to consider in determining whether a breach is material, including whether forfeiture will result. See O'Connell Mgmt., 765 F. Supp. at 783 (citing Restatement §241). This Restatement factor is in accord with the general disfavor of forfeiture under Massachusetts law. See

Howard D. Johnson Co. v. Madigan, 361 Mass. 454, 456-58 (1972) (breach of ancillary covenant does not prohibit a party from obtaining equitable relief); Herlihy v. Cushman & Wakefield, 76 Mass. App. Ct. 1128, *3 (2010) (no forfeiture where willful breach "was not so material that the defendant should receive a gift of the plaintiff's services"); Meehan v. Shaughnessy, 404 Mass. 419, 439 (1989). Yet, applying the rule of Sipley and Andre will always result in forfeiture of contract rights by a contractor who has failed in strict performance, regardless of the disparity between the value of the non-performance and the resulting forfeiture. Here, MTPC gets a completed project at a *huge* bargain—saving itself $4-$14 million, roughly 8%-30% of the $47 million contract price. And this result is obtained by *chance*: MTPC had withheld payment for some *other* bases, and then it asserted this alternative basis in litigation after payment delays had long been cured. This unjust result is readily avoided by applying the Restatement rule.

In 1986, this Court in J.A. Sullivan Corp. declined to apply the rules of Sipley and Andre in order to avoid forfeiture, citing "exculpatory factors" to allow a recovery, albeit in *quantum meruit*. The Court did not cite Restatement §237, although it did cite a similar provision from Williston on Contracts, to the effect that equity and

fairness require that recovery be allowed where there is "substantial performance but not full completion of the contract." J.A. Sullivan Corp., 397 Mass. at 793-794 (citing 5 S. Williston, Contracts § 805 (3d ed. 1961)). This Court went on to say that a rule that "would compel a court to find bad faith because of a departure of this kind...would be too rigid and unyielding for the practical accomplishment of justice." Id. at 797 (quotation omitted). Construction cases since Andre reflect case-by-case analytical creativity to avoid forfeiture in cases where it is unjust. Such cases are more readily and consistently resolved if the materiality rule is applied in construction contract disputes.

Second, here, in the words of the trial court, MTPC sought a "huge forfeiture", Exhibit 10 (excerpted 12/21/15 hearing trans.) at p. 80, without any record evidence of harm to warrant it. This result was unjust, as evidenced by its conflict with the basic contract principle that a party wronged by a contractual breach, as MTPC claimed it was, is to be made whole and no more. See Ficara, 331 Mass. at 83 ("The plaintiff is entitled to be made whole and no more. This is true in an action against a defendant for breach of contract, albeit a willful one....").[9] In

[9] Concannon v. Galanti, 348 Mass. 71 (1964) also held that an owner is entitled to be made whole and no

this case, MTPC asserted G4S's willful default in defense of G4S's claims and in its counterclaim. By virtue of the forfeiture, MTPC is allowed to retain the $4 million contract balance it happened to withhold for other reasons, but these monies bear no relationship to the compensation MTPC may be owed for the alleged breach. Ficara observed that a plaintiff suing a defendant who has willfully breached is entitled only to benefit of the bargain damages, although the same defendant might be unable to recover anything due to Sipley. But these two rules cannot both be consistently applied: one rule (Ficara) prevents a windfall recovery, while application of the other here (Sipley) has produced just that result.[10]

If the forfeiture rule is left intact, then clarity is needed regarding the application of the equitable *quantum meruit* doctrine in this context. There are clearly situations, as here, where applying a rule that an intentional breach of any provision of

---

more. There, the owner asserted that the failure of performance by the contractor was not correctable and resulted in a product of lesser market value than had performance been complete. Id. at 74. Although the breach alleged by MTPC here *was* curable under the Contract terms, even if it were not, the windfall forfeiture far exceeds any possible reduced market value of the work as performed, the typical measure of recovery in such a case. Forfeiture is inequitable.

[10] After obtaining the forfeiture remedy, MTPC filed another Rule 56 motion seeking damages for the same conduct. MTPC alleged its damages from the breach were $1.6 million—far less than the forfeited $4 million.

a contract requires a *per se* finding of lack of good faith which essentially precludes a *quantum meruit* recovery is wholly inequitable.[11] The conclusion, as a matter of law, that G4S cannot show "substantial performance" and an "endeavor...in good faith to perform fully" in light of the false PPRs and in spite of MTPC's acceptance of the completed Project would gut the *quantum meruit* concept. See Ex. 2 at p. 10 (citing Andre, 305 Mass. at 515). As applied here, the law would bar a contractor cited by OSHA for a "willful" violation of any safety regulation from recovering anything, on contract or for fair value, for complete work—either work performed before the citation that had not yet been paid for, or work post-dating the citation.[12] Such a rule would encourage contractors to abandon projects under these circumstances, harming owners, subcontractors, and all those employed on the project. The *quantum meruit* theory of recovery is meant to apply where, despite transgressions in performance which might bar recovery in contact, a party has delivered the benefit of the

---

[11] Under Sipley and Andre, an intentional breach does not preclude recovery if it is *de minimis*, however, if the trial court's analysis and application of this exception is accepted, the exception is toothless.

[12] Under the rule applied to G4S, if the OSHA violation were remedied and fine paid, and the contractor thereafter completed the work, the owner could still avoid final payment based on the cured violation.

bargain to the opposing party and denying recovery to the performing party would affect an unjust windfall.

Third, even under strict application of the rule of Sipley and Andre, summary judgment was improper. If G4S's breach were *de minimis* or excusable by exculpatory circumstances, since it otherwise substantially performed, Massachusetts law would allow for a *quantum meruit* recovery. See, e.g., J.A. Sullivan Corp., 397 Mass. at 797; Hayeck Bldg. & Realty Co. v. Turcotte, 361 Mass. 785, 791-92 (1972); Morello v. Levakis, 293 Mass. 450, 453 (1936). Here, any subcontractor payment breaches were not only immaterial, which would allow a recovery in contract under the materiality rule, they were also *de minimis*. G4S bore the risk of delays owing to late payments to subcontractors (which did not materialize). See Ex. 4, Ex. A at Art. 6.3.1. Further, G4S ensured that MTPC was protected by obtaining releases from its subcontractors in which the subcontractors represented they had been paid all amounts due. Ex. 5 (SMF) at ¶¶157-158. Although the Contract permitted MTPC to take over subcontractor payments, it never did so, because timing of payments did not impact completion of the work. The alleged breach had little, if any, potential to harm MTPC and did not cause harm in fact. On the other hand, MTPC received precisely what it bargained for under the Contract: a completed Project

and releases from all subcontractors (who were paid in full by G4S). Equity cannot condone this result. See Salamon v. Terra, 394 Mass. 857, 859 (1985) (*quantum meruit* is intended to prevent unjust enrichment).

Further, the trial court did not consider two highly relevant exculpatory factors, as J.A. Sullivan requires. First, G4S cured by paying all sub-contractor invoices in full, in spite of the fact that it was owed millions of dollars by MTPC. Second, the record suggests that some of the alleged late payments were owed *to MTPC*.[13] Accordingly, MTPC surely knew of any payment/PPR issues at the time but did nothing.[14] Having required G4S to complete its work with actual or constructive knowledge of the alleged breaches, MTPC should be barred from invoking the forfeiture rule. See Minichillo v. Cook, 3 Mass. L. Rptr. 181, 1994 WL 878824 (Mass. Super. Ct. Dec. 23, 1994).

Fourth, the record was insufficient to permit entry of judgment for MTPC as a matter of law. If the materiality rule applies, as G4S believes it should, this would require a fact-intensive inquiry typically

[13] MTPC supplied certain support for the Project to G4S, and G4S was required to reimburse MTPC through the progress payment/invoice process.

[14] The language of the PPRs was also ambiguous, and given the practice of submitting several invoices at once, to the extent it was intended to mean that G4S had distributed to subcontractors all monies paid on a prior invoice by the time it submitted the next one, MTPC surely knew that was not the case.

unsuited to summary disposition, as set out above. Even under a Sipley/Andre *quantum meruit* analysis, the record did not permit a matter of law determination that the alleged breach was more than *de minimis.*

The record below contained numerous factual disputes concerning, for example, which and how many invoices were paid late, whether G4S was entitled to withhold payments due to workmanship issues or other disputes, and the like. See, e.g., Ex. 5 (SMF) at ¶¶63, 68-70, 169. The trial court observed that MTPC identified no harm it suffered as a result of the breach, highly relevant to both a materiality and a *de minimis* analysis. Ex. 2 at p. 12. Further, as noted above, the record indicated that MTPC was among the parties paid "late" by G4S. See, Exhibit 11 (56(f) Affidavit) at ¶¶4, 15. To the extent more was needed to show participation in the breach, or waiver of it, by MTPC, G4S should have been given leave to do so before summary judgment entered, as discovery was ongoing. Id. See Minichillo, 1994 WL 878824, at *8 (allowing *quantum meruit* recovery where subcontractor was allowed to continue work despite known breaches).

Further, as noted herein, in moving for a damages recovery after the forfeiture award, MTPC asserted damages of $1.6 million, but correcting for various substantial errors in the approach (but accepting the underlying facts), potential damages amount to less

than $2,000. Exhibit 12 (Affidavit of Sheila Burke) at ¶¶3-7.[15] Had the trial court waited for a fully developed record, it would have become obvious that the breach was *de minimis*. See, e.g., Linkage Corp. v. Tr. of Boston Univ., No. 914660B, 1995 WL 809556, at *13 (Mass. Super. Mar. 28, 1995) (considering amount of damages in determining *de minimis* issue), vacated on other grounds 425 Mass. 1 (1997).[16] The trial court should not have acted based on the record before it.

vi. Reasons Direct Appellate Review Should Be Granted

Direct appellate review is appropriate in this case. This case gives the Court the opportunity to consider whether the Restatement's materiality rule should apply in construction contract disputes, as it has been applied to other contract disputes, and to clarify that a plaintiff who completes the bargained for work will not forfeit a contractual remedy for non-material breaches. This would relegate to history the harsh rule that any breach, intentional or not, no

[15] The 2015 summary judgment record showed that subcontractors had released payment claims, subcontractors did not consider their payments to be breaches of subcontracts, and payment issues did not contribute to delays; any breach was qualitatively *de minimis*. When MTPC sought damages for this same conduct, the record showed the conduct was quantitatively *de minimis* as well: under $1700.

[16] Any such nominal damages were not suffered by MTPC but rather by the non-party subcontractors who were allegedly paid late.

matter how minor, eviscerates any right that party has to a contractual remedy.

The Court will also have the opportunity to clarify whether the *quantum meruit* and unjust enrichment concepts, under the Andre line of cases, permit the forfeiture of millions of dollars in the situation where a contractor has fully completed and delivered the project anticipated by the parties' contract because of an intentional (but cured) breach which did not compromise the physical work performed for the benefit of the other party. This issue is highly significant not only to G4S but also to numerous other contractors who undertake complex projects throughout the Commonwealth on a regular basis, who will necessarily be impacted by this Court's ruling on this issue, as well as the surety industry, which is left in uncertainty as to how to quantify the risk of forfeiture.

CONCLUSION

For each of the foregoing reasons, this Honorable Court should grant direct appellate review of the Superior Court's decision.

Respectfully submitted,

G4S TECHNOLOGY LLC

By its attorneys,

Christopher Weld, Jr. (BBO# 522230)
cweld@toddweld.com
Megan C. Deluhery (BBO# 655564)
mdeluhery@toddweld.com
Maria T. Davis (BBO# 675447)
mdavis@toddweld.com
TODD & WELD LLP
One Federal St., 27th Floor
Boston, MA 02110
(617) 720-2626

Joel Lewin, Esq. (BBO# 298040)
jlewin@hinckleyallen.com
Rhian M.J. Cull, Esq. (BBO#662035)
Hinckley Allen and Snyder LLP
28 State Street
Boston, MA 02109
(617)345-9000

Dated: August 14, 2017

CERTIFICATE OF SERVICE

I, Maria T. Davis, hereby certify that on this 14th day of August, 2017, one copy of the foregoing was served via hand delivery upon counsel of record for Massachusetts Technology Park Corporation, Robert J. Kaler, Esq. and Edwin L. Hall, Esq., Holland & Knight, LLP, 10 St. James Avenue, 11th Floor Boston, MA 02116 and that one copy was this day filed by hand in the Appeals Court.

Maria T. Davis

1

notice sent 3/29/16 (SM)
HAS HK
JC RK
RC EH
JR SH

10 · 30

\ 3/29

NOTIFY

38

Denied on grounds of futility. See Memorandum of Decision of today's date.
[signature] 3/29/16

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
BUSINESS LITIGATION SESSION 2

MAR 31 2016

G4S TECHNOLOGY LLC, Plaintiff, v. MASSACHUSETTS TECHNOLOGY PARK CORPORATION, Defendant.	CIVIL ACTION NO. 14-02998-BLS2

2015 OCT 26 PM 3:55
SUFFOLK SUPERIOR COURT
CLERK MAGISTRATE

MOTION FOR LEAVE TO AMEND COMPLAINT TO SEEK RECOVERY IN QUANTUM MERUIT

Pursuant to Mass. R. Civ. P. 15(a) and Superior Court Rule 9A, Plaintiff, G4S Technology LLC ("G4S"), hereby respectfully requests that this Court grant G4S leave to amend the Complaint in the above-captioned action for the purpose of clarifying the nature of the relief it seeks. The Court should grant the present Motion in the interest of justice, since there is no undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies, undue prejudice to any party or futility. In support of this Motion, G4S files herewith a separate Memorandum of Law, which is incorporated as if set forth fully herein ("Memorandum"). A copy of G4S' proposed Amended Complaint is attached as Exhibit A to the accompanying Memorandum.

WHEREFORE, G4S respectfully requests that this Court grant G4S leave to file and serve the proposed Amended Complaint in the above-captioned action, which is set forth at Exhibit A to the accompanying Memorandum.

2

notice sent 3/29/16 (SM)
HRAS HK
JL RK
RC EH
SR SH

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPERIOR COURT

G4S TECHNOLOGY LLC,

Plaintiff,

v.

MASSACHUSETTS TECHNOLOGY PARK CORPORATION,

Defendant.

CIVIL ACTION NO. 2014-02998-BLS2

2015 NOV 10 PM 1:24

SUFFOLK SUPERIOR CIVIL ACTION

CLERK/MAGISTRATE

Allowed. See Memorandum. MTPC, Daniel O'Connell, J. 3/29/16

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Mass. R. Civ. P. 56(b), defendant Massachusetts Technology Park Corporation ("MassTech") respectfully moves this Court for summary judgment against plaintiff G4S Technology LLC ("G4S") on all counts of G4S's complaint.

The grounds for this motion, as more fully set forth in the supporting papers filed herewith,[1] is that G4S repeatedly intentionally breached the Design Build Agreement under which it is suing MassTech (the "Contract"), and is therefore barred from pursuing the claims set forth in its complaint as a matter of well-settled Massachusetts law. *Service Publications, Inc. v. Goverman*, 396 Mass. 567, 573 (1986) ("The law of this Commonwealth precludes recovery by one who wilfully commits a breach of a contract regardless of whether the breach goes to the essence of the contract."); *Swaney v. Clark-Wilcox Co.*, 331 Mass. 471, 475 (1954) ("The general rule established in *Sipley v. Stickney* that any wilful default in the performance of a contract bars recovery is still law.").

[1] See "Superior Court Rule 9A Statement of Undisputed Material Facts on Defendant Massachusetts Technology Park Corporation's Motion for Summary Judgment," dated Sept. 11, 2015, filed herewith, which cites directly to the sworn depositions and authenticated exhibits attached to the "Affidavit of Eileen Pellerin Attaching Deposition Transcripts and Exhibits" ("Pellerin Aff."), dated Sept. 11, 2015, also filed herewith, and the Memorandum of Law in Support of MassTech's Motion for Summary Judgment, filed herewith.

Notice sent 3/29/16 (SM)
HMS HK
SL AK
RC EH
JR SA

3/29

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
CIVIL ACTION
NO. 2014-02998-BLS2

G4S TECHNOLOGY LLC,
Plaintiff,

vs.

MASSACHUSETTS TECHNOLOGY PARK CORPORATION,
Defendant.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This is a contract dispute arising from a state and federally-funded project to design and construct a fiber optic network in western Massachusetts. Plaintiff G4S Technology LLC (G4S), the design-builder on the project, claims that the defendant Massachusetts Technology Park Corporation (MTPC) wrongfully denied a $10.1 Million "Request for Adjustment" claim, and that MTPC improperly withheld an additional $4.1 Million based on unfounded claims of late delivery and poor quality of work. G4S asserts claims for breach of contract and breach of warranty, and (by way of a motion to amend) for quantum meruit. MTPC, in turn, brings counterclaims against G4S alleging (among other things) fraud and violation of G.L. c. 93A; it seeks several million dollars of additional damages beyond the retained amount. MTPC now moves for summary judgment as to G4S's claims against it, asserting that G4S is precluded from recovery because it intentionally breached its own contractual obligations.[1] MTPC also moves

[1] At the same time the summary judgment motion was filed, G4S moved to amend its complaint to add a quantum meruit claim. As of the date of the hearing, MTPC opposed that motion only on the grounds of futility and, as part of the presentation on its summary judgment motion, argued that there was no legal basis for the quantum meruit claim either. Thus, in disposing of the summary judgment motion, this Court deals with the merits of the quantum meruit claim at the same time.

for summary judgment in its favor on some of its counterclaims. For the reasons set forth below, MTPC's Motion is **Allowed** as to G4S's Complaint but **Denied** as to MTPC's counterclaims.[2]

BACKGROUND

MTPC is a state development agency established and organized under G.L. c. 40J. In July 2010, it received both state and federal funding to build a 1,200-mile fiber optic network known as MassBroadband123 in western Massachusetts (the Project). Of that amount, $45.4 million was awarded pursuant to the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5. One of the stated goals of ARRA was (as its title suggests) to create jobs in the wake of the 2008 recession and to provide a direct financial boost to those impacted by the economic crisis. In the context of the instant case, that meant that, if there were to be subcontractors on the job providing labor and materials, they needed to be paid on a timely basis in keeping with the statutory purpose of stimulating the economy.

MTPC put the Project out for a public bid, and a design-build contract with G4S was executed on June 30, 2011 (the Contract). In line with federal requirements, the Contract had specific provisions to ensure timely payment of subcontractors. Specifically, Section 6.3.1 of the Contract stated:

> Design Builder [G4S] will pay Design Consultants and Subcontractors, in accordance with its contractual obligations to such parties and subject to any provisions of such contracts regarding the withholding of sums from any subcontractor or design consultants for their non-compliance with or non-performance of their contracts, all the amounts Design-Builder [G4S] has received from Owner [MTPC] on account of their work.

To make sure that G4S honored this obligation, the Contract stated that G4S had to include with

---

[2] MTPC also moved to strike all or portions of affidavits submitted by G4S in opposing the summary judgment motion. The Court declines to address those motions, since MTPC would prevail even if they were all denied.

its own applications for payment a "progress payment release" (the Certification). See Section 6.1.1 of Contract. The Certification (attached to the Contract as Exhibit B-1) stated that G4S "represents and warrants" that:

> all subcontractors, suppliers and equipment providers of the undersigned have been paid in full all amounts due to them up to the date of this Certification, and that sums received in payment for the Amount Requested shall be used to forthwith pay in full all amounts due to such subcontractors, suppliers, and equipment providers up to the date hereof.

Contract at Exhibit B-1, ¶ E. The Contract made the submissions of these Certifications part of the "Work" G4S agreed to perform. See Section 1.2.13 of the General Conditions of Contract (defining "Work").Finally, the Contract stated that G4S had to comply with all applicable state and federal laws, including the False Claims Act, 15 U.S.C. §§ 3729-3733, and the Massachusetts False Claims Act, G.L. c. 12, §§5A-5O. See Section 2.18.1.4 of General Conditions of Contract. The False Claims Act makes it unlawful to knowingly make a false statement in order to get a claim for payment approved where the federal government provides some portion of that reimbursement. 31 U.S.C. § 3729 (a) and (c).

As the Project progressed, G4S submitted dozens of Applications for Payment accompanied by the signed Certifications that were necessary in order to obtain payments from MTPC. In each of those submissions, G4S certified that all of its subcontractors had been paid the amounts due them at the time the Certification was executed. It is undisputed that this was not true. The summary judgment record shows that G4S understood at the time that this conduct was in violation of the Contract. It also shows that the reason for the delay in payment to at least some (if not all) subcontractors was to improve G4S's own financial picture. This was not limited to a handful of occasions but was repeated and continuous conduct that spanned more than a year.

Evidence as to G4S's conduct, knowledge and motivation is found in G4S's own business records and in internal correspondence as well as the deposition testimony of key G4S employees. For example, Judith Krantz, G4S's Contract Manager responsible for paying subcontractors, acknowledged in contemporaneous emails and in her later deposition that, even as G4S was certifying to MTPC that all amounts due had been paid to subcontractors, there were in fact past due invoices for significant sums that were outstanding at the time the Certifications were executed. Krantz knew this, yet submitted the Certifications anyway. Among those who did not receive timely payments were NextGen, Gannett-Fleming, Phoenix, Penta Communications, Annese Electric, and Tower Resources Management, Inc. There is undisputed evidence that G4S timed its payments to these subcontractors so that they occurred after G4S's own quarterly financial statements came out. In one internal email dated September 25, 2012, G4S project manager Scott Mailman pointedly criticized this practice, writing: "How can we tell subs that they aren't getting paid so our books look better? There's something wrong with that."

These delays did not go unnoticed by the subcontractors, who in some instances strongly objected and threatened to shut down work or pull crews if G4S continued to withhold payments even as it was getting paid by MTPC. As one subcontractor stated in an email to G4S's Treasurer: "I think it is extremely unfair that you are not honoring our contract … The issue that bothers me the most is that you are not making payment to better your books but don't care about the books of the companies that support you." In September 2012 emails to Krantz, subcontractor NextGen noted that it had past due invoices to G4S in the amount of $358,275; a NextGen representative stated that "[t]his is a "significant problem for us" and that "nextGen's cash flow challenges will be exacerbated as we ramp up our number of crews if we are not paid within [contract] terms." In December 2012, another unpaid subcontractor (Annese) actually

threatened to stop work because of unpaid invoices and then in June 2013, emailed G4S again to complain, citing specific sections of the subcontract that required payment within a certain time. Annese made the same threat again in December 2013, when G4S persisted in its practice of late payments. When subcontractor Penta asked on December 2013 about its outstanding invoices, Krantz informed it that "all subcontract payments are on hold until after the first of the year," prompting a Penta representative to reply: "That is not acceptable. This money is due and I need to collect it before the end of the year. This is a direct violation of the contract." It too threatened to pull crews off the job on more than one occasion. Even as these objections and complaints were being made, G4S continued to submit to MTPC Certifications that these subcontractors had been paid for all amounts due in order to obtain full payment for itself.

At some point, a dispute developed between the parties over which of them was responsible for delays and disruptions connected to the Project, and MTPC decided to withhold funds from G4S. In response, G4S commenced this action in September 2014. In early January 2015, MTPC provided G4S with a Certificate of Final Completion.

DISCUSSION

MTPC moves for summary judgment both as to the claims against it and on its counterclaims. This Court will discuss that part of the motion dealing with G4S's claims first.

MTPC contends that G4S cannot recover under any contract or quasi-contract based theory because the undisputed evidence shows that it intentionally failed to perform its own contractual obligations. In opposition, G4S argues, among other things, that to preclude G4S from pursuing its multimillion dollar claims would be grossly disproportionate to the harm that flowed from its own failure to timely pay subcontractors and would be manifestly unfair. More specifically, it contends that any breach that occurred on its part was "de minimis" and at the

very least, should not prevent it from recovering in quantum meruit. After a careful examination of the applicable law, this Court concludes that G4S is indeed prevented from seeking recovery on its own claims as a consequence of its intentional breaches of the Contract.

It is well established that a contractor like G4S "cannot recover on the contract itself without showing complete and strict performance of all its terms." Peabody N.E., Inc. v. Mansfield, 426 Mass. 436, 441 (1998), quoting Andre v. Maguire, 305 Mass. 515, 516 (1940); see also United States Steel v. M. DeMatteo Const. Co., 315 F.3d 43, 48 (1st Cir. 2002); PDM Mech. Contractors, Inc. v. Suffolk Const. Co., Inc., 35 Mass. App. Ct. 228, 230 (1993). The undisputed facts show that G4S did not completely and strictly perform all of its obligations under the Contract. Although a contractor may still be able to recover under a theory of quantum meruit, that would be permitted only if it proves "both substantial performance of the contract and an endeavor on [its] part in good faith to perform fully." Peabody N.E., Inc., 426 Mass. at 442; see also United States Steel, 315 F.3d at 48; PDM Mech. Contractors, Inc., 35 Mass. App. Ct. at 230-231. An intentional departure from contractual requirements is not consistent with good faith and will bar even a quantum meruit recovery unless the departure is de minimis. J.A. Sullivan Corp. v. Commonwealth, 397 Mass. 789, 794 (1986), quoting Andre, 305 Mass. at 516; see also Hayeck Bldg. & Realty Co. v. Turcotte, 361 Mass. 785, 789 (1972); Peabody N.E., Inc., 426 Mass. at 442; United States Steel, 315 F.3d at 48. Thus, contrary to G4S's position, the breach in question does not have to be so material as to go to the "essence of the contract." Service Publications, Inc. v. Goverman, 396 Mass. 567, 573 (1986), citing Sipley v. Stickney, 190 Mass. 43, 46 (1906); see also McNeal-Edwards v. Frank L. Young Co., 51 F.2d 699, 702 (1st Cir. 1931). The violation at issue here was not de minimis.

The undisputed deposition testimony from G4S's Contract Manager and Deputy Program

Manager as well as G4S's internal email communications show that G4S repeatedly withheld past due payments from at least some of its subcontractors at the same time that it sent Certifications to MTPC representing and warranting that these same subcontractors had been paid all amounts due them. This evidence also establishes that G4S, a publicly traded company, deliberately withheld these payments not for any legitimate reason but instead for the purpose of showing higher cash balances on its periodic financial statements.[3] Sections 6.1.1 and 6.3.1 of the Contract explicitly required not only that payment to subcontractors be made within the time frames specified in the subcontracts, but also required G4S to submit written Certifications to that effect in order to get MTPC to pay it. Based on this undisputed evidence, this Court concludes that G4S's actions were intentional breaches of the Contract, and that its conduct was of the sort that precludes all recovery from MTPC.

In an attempt to avoid this result, G4S makes several arguments as to why the common law rule barring recovery should not be applied to it. The Court will address each in turn.

First, G4S contends that the subcontractors agreed to the late payments and that as a consequence, there was a modification of the underlying subcontracts; thus, G4S (it is argued) was not technically wrong in certifying to MTPC that it had paid the subcontractors what was contractually due and owing. This position is simply not supported by the evidence in the summary judgment record, however. For example, G4S's contract manager Krantz states in an affidavit that "G4S made agreements with subcontractors regarding payment of *certain invoices* that varied the payment terms in their subcontracts. " Jennifer Krantz Aff. at ¶¶ 16-18 (emphasis added). Clearly, that does not cover all of them. Moreover, email exchanges between G4S and

[3] G4S maintains that in some instances, it rightfully withheld payment due to performance, technical, or billing issues. Assuming that to be true, that does not change the fact that on numerous other occasions, payment was withheld because G4S wanted to improve its own financial picture, not because it had a right to withhold payment pursuant to its contract with the subcontractor.

its subcontractors show that in 2012 and 2013, when these events took place, there were several subcontractors who were unhappy with the late payment and who informed G4S in no uncertain terms that they regarded G4S's practice as a direct violation of its contractual obligations. Finally, Krantz at her deposition repeatedly acknowledged that there were many outstanding invoices from subcontractors that were due and owing even as G4S was representing to MTPC that all amount due had been paid.

It is true that G4S has submitted (nearly identical) affidavits from officers of six of the seven subcontractors which state that they "did not consider payments made after the expiration of the [period for payment] to be a breach of the Subcontract." These affidavits were submitted well after this litigation began and appear to contradict in several respects what the subcontractors did and said at the time of the events on question. Accepting them at face value, however, these affidavits show only that the subcontractors were willing to accept late payment, not that they agreed to a permanent modification of their subcontracts so as to permit a different payment schedule. Indeed, regardless of whether the subcontractors tolerated the delays, that does not change the fact that the Certifications submitted to MTPC were inaccurate. In those Certifications, G4S represented to MTPC that "all subcontractors, suppliers and equipment providers of the undersigned have been paid in full all amounts due to them" at the time the Certification was executed. Clearly, that was not true and G4S knew that at the time.

Second, G4S argues that Section 10.2 of the Contract, entitled "Owner's Right to Perform or to Terminate for Cause," supplants the common law rule barring recovery on a contract not strictly and completely performed. That section sets forth specific remedies for breach of contract (i.e., termination, cure, and recovery of all costs and expenses including attorneys' fees). Certainly, parties can limit their remedies and entirely eliminate a remedy that would otherwise

be available at common law. See, e.g., Walsh v. Atlantic Research Assoc., 321 Mass. 57, 62-63 (1947). Section 10.2 does no such thing, however.

"Under Massachusetts law, if a contract does not specify that the remedies identified are exclusive, or that they abrogate the common law remedies available, the common law remedies still apply." United States Steel, 315 F.3d at 49; see also Finkelstein v. Sneierson, 273 Mass. 424, 704 (1930). That is precisely the case here. Section 10.2.1 of the Contract states that, upon a default, "Owner, in addition to the rights and remedies provided in the Contract Documents or by law, shall have the rights set forth in Sections 10.2.2 through 10.2.4." (Emphasis added). Section 10.2.2 through 10.2.4 provide that, upon default, the "Owner may provide written notice to Design-Builder that it intends to terminate the Agreement unless the problem cited is cured" and that upon failure to cure, the "Owner may" terminate the agreement, hire others to correct the problem, withhold payment otherwise due to "Design-Builder," or take steps to mitigate the effects of the default. (Emphasis added). This permissive language is significant. See, e.g., United States Steel, 315 F.3d at 50 (where contractual clause stated that "the contractor may" before specifying remedies for breach, the provision did not supplant common law remedies); compare Walsh, 321 Mass. at 59, 63 (relevant clause used the word "shall" and used other language that made remedy exclusive in nature). In short, Section 10.2 provides for remedies in addition to the common law and does not by its terms prevent MTPC from invoking the common law rule at issue here.

Third, G4S contends that the common law rule should not apply because any breach on its part was cured. In support, it relies on evidence that all the contractors were eventually paid in full. That the subcontractors were eventually paid what they were owed, however, does not change the fact that G4S made inaccurate representations to MTPC in its Certifications. In order

to cure that breach, G4S would have had to inform MTPC of the error at or near the time the statements were made, before MTPC was induced to make any payment. It did no such thing.

G4S's strongest argument is that this is not the kind of conduct that would support the very large forfeiture that would occur here -- namely, the loss of G4S's right to collect millions of dollars from MTPC that G4S alleges were wrongfully withheld.[4] That is particularly true since the job was ultimately completed and there is no evidence that any delays in payment had any impact on the Project itself. Thus, even assuming an intentional breach, G4S contends that it should not be precluded from pursuing its claim under a theory of quantum meruit. It points out that this theory is one derived from principles of equity and fairness, and argues that it would be unjust to deprive it of compensation for the work it performed so long as that performance was substantial.

The case law is clear, however, that the quantum meruit doctrine has no application in the case of an intentional breach by the claimant unless the claimant can prove "both substantial performance of the contract and an endeavor on his part in good faith to perform fully, and the burden is upon him to prove both." Andre, 305 Mass. at 515 (emphasis added). "In the absence of special exculpating circumstances, an intentional departure from the precise requirements of the contract is not consistent with good faith in the endeavor fully to perform it, and unless such departure is so trifling as to fall within the de minimis rule, it bars all recovery." Id. Thus, it is not enough for G4S to show that it substantially performed. It must further demonstrate that the breach was as so insubstantial as to be trivial, or that there were other mitigating factors. Such mitigating circumstances exist where the party complaining of the breach was itself partially responsible for the plaintiff's nonperformance. See, e.g., Peabody N.E. Inc., 426 Mass. at 442;

[4] Although MTPC vehemently denies that it owes G4S anything quite apart from the reasons it offers in support of the instant Motion, this Court assumes for purposes of this Motion that G4S's claims are meritorious.

see also J.A. Sullivan Corp., 397 Mass. at 794. Certainly, there are no such circumstances present here.

The issue thus boils down to whether G4S's conduct was insignificant enough to fall within the de minimis rule as articulated and described in the case law. This Court concludes that it was not. In an effort to convince the Court otherwise, G4S points out that it completed the Project, eventually paid all of the subcontractors in full, and that late payments never impacted the physical work on the Project or for that matter really harmed MTPC in any material way. As to the extent of harm, that may very well be relevant in terms of whether MTPC can affirmatively recover; it is not relevant in determining whether the common law rule bars G4S's claims. Moreover, this Court does not view G4S's conduct to be consistent with the good faith that the doctrine of quantum meruit requires. The reason for delaying payment to the subcontractors was to improve its own financial picture, even if this meant that the subcontractors themselves would suffer. The requirement that payments be timely was an important part of this Contract; a large part of the funding for the Contract was pursuant to a statute intended to improve the lot of everyone hurt by the 2008 financial crisis, not just those at the top. Consistent with this purpose, MTPC was required, as a condition of the grant, to "make drawdowns from the funds as close as possible to the time of making disbursements" and to "monitor cash draw downs by their subgrantees to assure that they conform substantially to the same standards of timing and amount as apply to advance the grantees." 15 C.F.R. § 24.20. The Contract reflected these mandates. Read in the context of the ARRA, it is clear that the timely payment and certification requirements were key aspects to G4S's "Work" under the Contract, not some incidental or trivial activity separate and apart from the physical work. And the failure to adhere to these requirements was not confined to a handful of occasions but constituted a

continuing course of conduct spanning more than a year.

MTPC asserts that the same undisputed facts that entitle it to judgment in its favor on G4S's Complaint also entitle it to judgment on its counterclaims for fraud and violation of G.L. c. 93A. It is one thing for this Court to conclude that G4S's conduct bars it from pursuing claims against MTPC. It is another thing entirely, however, for this Court to conclude that MTPC is entitled to summary disposition of its own claims against G4S. One does not necessarily follow from the other.

While the record before the Court supports the conclusion that the inaccurate Certifications amounted to an intentional breach of contract that was not de minimis, the record does not similarly permit the Court to find, as a matter of law, that the filing of the Certifications constituted material misrepresentations sufficient to support an affirmative claim by MTPC for fraud. Likewise, although G4S's conduct was of the sort that prevents it from recovering on its own claims, it remains a question of fact as to whether that same conduct constitutes the kinds of unfair and deceptive business practice prohibited by Chapter 93A so as to give MTPC a right to recover under that statute. This is particularly true given the absence of any clear evidence in the record that MTPC suffered any concrete loss of money or property -- an indispensable element of any claim made pursuant to G.L.c. 93A §11. See Auto Flat Crushers, Inc.t v. Hanover Ins. Co., 469 Mass. 813, 823 (2014). Finally, a 93A claim under Section 11 may only be brought by a person acting in a business context. See Frullo v. Landenberger, 61 Mass. App. Ct. 814, 821 (2004). In the instant case, there is a real question as to whether MTPC, a government agency without a profit motive, was engaged in trade or commerce when it entered into the Contract with G4S so as to have standing to seek 93A relief. See All Seasons

Servs., Inc. v. Commissioner of Health & Hosps. of Boston, 416 Mass. 269, 271 (1993) (public hospital was not a "person" engaged in "trade or commerce" for purposes of G.L. c. 93A, § 11 when it solicited bids and awarded contracts for food and vending services at its facility).

CONCLUSION AND ORDER

Accordingly, for the forgoing reasons, the Motion for Summary Judgment brought by Massachusetts Technology Park Corporation is **ALLOWED** as to G4S Technology LLC's Complaint but **DENIED** as to the counterclaims.

Janet L. Sanders
Justice of the Superior Court

Dated: March 29, 2016

3

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

1484CV02998 G4S Technology LLC vs. Mass Technology Park Corp

CASE TYPE:	Contract / Business Cases	**FILE DATE:**	09/22/2014
ACTION CODE:	BK1	**CASE TRACK:**	B - Special Track (BLS)
DESCRIPTION:	Other Complex Commercial Actions		
CASE DISPOSITION DATE	03/28/2017	**CASE STATUS:**	Open
CASE DISPOSITION:	Judgment after Finding on Motion	**STATUS DATE:**	03/28/2017
CASE JUDGE:		**CASE SESSION:**	Business Litigation 2

LINKED CASE

PARTIES

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

Plaintiff
G4S Technology LLC

655564
Megan C Deluhery
Todd & Weld LLP
Todd & Weld LLP
One Federal St 27th Floor
Boston, MA 02110-2012
Work Phone (617) 720-2626
Added Date: 11/17/2016

522230
Christopher Weld
Todd & Weld LLP
Todd & Weld LLP
One Federal St 27th Floor
Boston, MA 02110-2012
Work Phone (617) 720-2626
Added Date: 11/17/2016

Private Counsel **298040**
Joel Lewin
Hinckley Allen & Snyder LLP
Hinckley Allen & Snyder LLP
28 State St
Boston, MA 02109
Work Phone (617) 378-4164
Added Date: 10/08/2014

Private Counsel **662035**
Rhian M Cull
Hinckley Allen & Snyder
Hinckley Allen & Snyder
28 State St
Boston, MA 02109
Work Phone (617) 378-4120
Added Date: 12/04/2014

675447
Maria Davis
Todd & Weld LLP
Todd & Weld LLP
One Federal St 27th Floor
Boston, MA 02110-2012
Work Phone (617) 720-2626
Added Date: 11/17/2016

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

Defendant	**Private Counsel** 542040
Mass Technology Park Corp	Robert J Kaler Holland & Knight LLP Holland & Knight LLP 10 St James Ave Boston, MA 02116 Work Phone (617) 523-2700 Added Date: 10/14/2014
	Private Counsel 667276 Edwin Latham Hall Holland & Knight LLP Holland & Knight LLP 10 St James Ave Boston, MA 02116 Work Phone (617) 573-5806 Added Date: 04/03/2015
	Private Counsel 679583 Stephen Patrick Hall Holland & Knight LLP Holland & Knight LLP 10 Saint James Ave Boston, MA 02116 Work Phone (617) 523-2700 Added Date: 03/02/2015

FINANCIAL DETAILS

Date	Fees/Fines/Costs	Assessed	Paid	Dismissed	Balance
04/19/2016	Fee for unattested copy of court documents, records, papers, G.L. c. 262 § 4b. Receipt: 3719 Date: 04/19/2016	13.00	13.00	0.00	0.00
	Total	**13.00**	**13.00**	**0.00**	**0.00**

Deposit Account(s) Summary	Received	Applied	Checks Paid	Balance
Total				

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

INFORMATIONAL DOCKET ENTRIES			
Date	**Ref**	**Description**	**Judge**
09/22/2014	1	Complaint (Business) & jury demand	
09/22/2014		Origin 1, Type BK1, Track B.	
09/22/2014	2	Civil action cover sheet filed (n/a)	
10/08/2014	3	NOTICE OF ACCEPTANCE INTO THE BUSINESS LITIGATION SESSION; it has been assigned to the BLS2 Session (Suffolk). (Sanders,J) Notice sent 10/8/14 (entered 9/24/14)	
10/10/2014	4	SERVICE RETURNED: Mass Technology Park Corp(Defendant) (accepted by attorney on 10/7/14)	
11/05/2014	5	Defendant Mass Technology Park Corp's Notice of intent to file motion to Dismiss	
12/03/2014	6	Court received a letter to the Honorable Janet Sanders from the deft Mass. Technology Park Corp seeking guidance from the Court as to how it wishes to proceed with this action. Based on Counsel's representation and fact that motion already prepared and served before case accepted in the BLS, this court concludes partially dispositive motion may be filed (Janed Sanders, Justice) (entered 12/2/14) notices mailed 12/3/14	
12/16/2014	7	Defendant Mass Technology Park Corp's MOTION to Dismiss (MRCP 12b) Complaint of G4S Technology LLC (w/opposition)	
02/24/2015	8	Court received letter addressed to Hon. Janel L. Sanders from Plaintiff's Attorneys requesting that the Court pospone the March 3, 2015 hearing - Request for postponment is DENIED. Both sides are kindly reminded that the court does not accept advocacy by letter and accordingly I have not considered arguments made in either letter which go to the merits of the underlying motion. (Roach, J) Dated: 2/23/15 Notice sent 2/24/15	
03/13/2015	9	ORDER TRACKING ORDER, as amended by the Court . Next Rule 16 Conference 5/27/15 at 2:00pm. Parties to file written status and agenda for conference on or before 5/20/15. (Christine M. Roach, Justice) (entered 3/12/14) notices mailed 3/12/15	
03/23/2015		Motion (P#7) DENIED. Please see memorandum and order of this date.(Christine M. Roach, Justice) Notices mailed 3/20/2015 (entered 3/19/15)	
03/23/2015	10	MEMORANDUM AND ORDER ON DEFT'S MOTION TO DISMISS WARRANTY COUNT (Christine M. Roach, Justice). Copies mailed 3/20/15 (ENTERED 3/19/15)	
04/02/2015	11	ANSWER: Mass Technology Park Corp(Defendant) COUNTERCLAIM & jury demand (all issues)	

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

04/08/2015	12	Emergency MOTION of deft Mass Technology Park Corp for ab order to preserve evidence and grant access Motion DENIED without prejudice The pleading does not reflect a good faith effort to confer as required by Superior Court Rule 9C and there is no emergency At this stage of the case the court is not inclined to rule without receiving an explanation from each side and I cannot see why a hearing would be required Following a oral and detailed conferance between individuals from each side with knowledge and authority to make a responsible discovery decision if the parties are unable to agree or narrow their dispute they should inform the clerk Based on the limited information before me I cannot understand why the plff would want to risk spoliation sanctions That said preservation and discovery production are not the same thing yet may appear to be comingled in this pleading (Roach,J) (entered 3/7/15)
04/16/2015	13	Renewed Emergency MOTION (w/Rule 9C Certificate) of Defendant Mass Technology Park Corp for an Order to Preserve Evidence and Grant Access: Following review of all leadings filed by both sides: (1) The court continues to find no emergency, (2) Nor does the court see the need for a Discovery Master or another Rule 16 conference at this time. (3)E Discovery Issues are not new, and are routinely resolved by parties in this session everyday. I am by no means pursuaded that these parties have engaged in any where near the appropriatly diligent and good faith 9(c) efforts to confer and to narrow their Ediscovery issues before as the court to Rule. (4) For purposes of moving discovery at the proper pace consistent with the tracking order, the motion is ALLOWED to the limited extent that Defendant shal be provided with a facsimile copy (by which I mean a true accessibly copy) of all non-privileged portions of the "private" file it claims is missing from production. I am not persuaded "access to the full site" is either appropriate or required, this production shall be accomplished no later than April 24, 2015. The parties are further ORDERED to continue conferring on all of thei Ediscovery issues, and to fial a Stipulated Ediscovery Protocol with the court, also by April 24, 2015. The motion is otherwise DENIED (Roach, J.) (filed 4/14/15, entered 4/16/15) notice sent 4/16/15
04/16/2015	14	Supplemental Memorandum in Support of Renewed Emergency Motion of Defendant Mass Technology Corp for an Order to Preserve Evidence and Grant Access (filed 4/16/15)
04/16/2015	15	Memorandum in Opposition to the "Emergency" Motion for an Order to Preserve Evidence and Grant Access, and in Support of its Cross-Motion for a Protective Order, Rule 16 Conference and the Appointment of a Discovery Master filed by Plaintiff
04/17/2015	16	Plaintiff's Notice of Cross-Motion for a Protective Order, Rule 16 Conference and the Appointment of a Discovery Master: Cross-Motion DENIED. Please see endorsement on Paper #13 (Roach, J.) (filed and entered 4/16/15) notice sent 4/17/15
04/22/2015	17	ANSWER by G4S Technology LLC to COUNTERCLAIM of Mass Technology Park Corp
04/29/2015	18	STIPULATION AND ORDER ON PRODUCTION OF ELECTRONICALLY STORED INFORMATION: so Ordered (Roach, J.) (filed 4/27/15, enterec 4/28/15) notice sent 4/29/15

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

05/20/2015	19	Defendant's Status Report and Agenda in preparation for May 27, 2015 Rule 16 Conference
05/21/2015	20	Plaintiff G4's Status Report and Agaenda in preparation for May 27, 2015 Rule 16 Conference
05/26/2015	21	Defendant's Status Report and Aenda in preparation for May 27, 2015 Rule 16 Conference
05/27/2015	22	Motion of deft Mass Technology Park Corp Motion for an order compelling access to project sharepoint site and for costs (w/opposition)
05/27/2015	23	Affidavit of n Michael Sarlo
05/27/2015	24	Affidavit of [Michael Sarlo
05/27/2015	25	Affidavit of Frank Jaffe
05/27/2015	26	Affidavit of Steven Wengert
05/27/2015	27	Affidavit of Michael D'Angelo
05/27/2015	28	Affidavit of Torrence A ("Al") Gay
05/27/2015	29	Affidavit of Eileen Pellerin
06/02/2015	30	Court received letter from the plaintiff to Hon. Christine Roach requesting leave to file Sur-Reply memorandum: Request for leave to file sur reply ALLOWED, of no more than 5 pages, to be delivered to courtroom 1017 before 4:00 pm no Tuesday 6/2/15 (Roach, J.) (entered 5/29/15) notice sent 6/2/15
06/02/2015	31	Sur-Reply Memorandumj in Support of Opposition to Mass Technology Park Corp's Motion to "Compel Access to the Project Sharepoint Site, and for Costs"
06/02/2015	32	Supplemental Affidavit of Michael D Sarlo in Opposition to Mass Technology Park Corp's Motion to Compel Access to Project Sharepoint Site, and for Costs"
06/03/2015	33	Deft;s Motion to strike " supplemental affidavit of Michael D Sarlo in opposition to Mass Technology Park Corp Motion to compel access to project Sharepoint Site and for Costs"
06/04/2015	34	Objection to Defendant's Motion to Strike "Supplemental Affidavit of Michael D Sarlo in Opposition to Massachusetts Technolongy Park Corporation's Motion to Compel Access t Project Sharepoint Site and for Costs
06/09/2015		Motion (P#22) ALLOWED in part & DENIED in part Please see Memo and Order of this case (Christine M. Roach, Justice) Notices mailed 6/8/2015 (entered 6/8/15)
06/09/2015		Motion (P#33) DENIED as moot The Court need not and does not consider the supplemental affidavit (Paper 32) in rling o the motio to compel (PPWE #22) (Christine M. Roach, Justice). Notices mailed 5/8/15 (entered 6/8/15)

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

06/09/2015	35	Memorandum: & order on deft's Motion to compel access to Project Sharepoint Site & for costs Deft Mass Tech's Motion for an order compelling access to Project SharePoint Site and for costs is ALLOWED in part & DENIED in part The reequest for costs is DENIED at this time Please see full text of order at pages 6-7 herein so ordered (Rouse,J)	
06/09/2015	36	First Amendment to tracking order so ordered (Roach,J) (entred 6/8/15)	
10/07/2015		Event Result: The following event: Rule 16 Conference scheduled for 10/07/2015 02:00 PM has been resulted as follows: Result: Held as Scheduled	Sanders
10/07/2015		The following form was generated: Notice to Appear Sent On: 10/07/2015 14:50:43	
10/09/2015	37	General correspondence regarding Joint Status Report and agenda in preperation for October 7, 2015 Rule 16 Conference, filed on 10/6/15 11/12/15 hearing for SJ Motion, Motion to amend @2:00pm (entered 10/8/15) notices mailed 10/8/15	Sanders
10/26/2015	38	G4S Technology LLC's Motion for leave to Amend Complaint to Seek Recovery in Quantum Meruit with Opposition and Plaintiffs Reply Memorandum Applies To: G4S Technology LLC (Plaintiff)	
11/10/2015	39	Defendant Mass Technology Park Corp's Motion for summary judgment, MRCP 56 (w/opposition)	
11/10/2015	40	Defendant Mass Technology Park Corp's Motion to strike affidavits of G4S deponents Dusseault, Krantz & Lasala	
11/10/2015	41	Defendant Mass Technology Park Corp's Motion to strike portions of the affidavit of subcontractors (w/opposition)	
11/10/2015	42	Application for Rule 56(F) Applies To: G4S Technology LLC (Plaintiff)	
11/10/2015	43	Affidavit of Rhian M.J. Cull in support of Plainitt's Rule 56(F) Application Applies To: G4S Technology LLC (Plaintiff)	
11/10/2015	44	General correspondence regarding Response to Plaintiff's Rul3 56(f) Application (P#42) Applies To: Mass Technology Park Corp (Defendant)	

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

11/12/2015		Event Result: The following event: Motion Hearing to Amend Complaint scheduled for 11/12/2015 02:00 PM has been resulted as follows: Result: Rescheduled Reason: Not reached by Court	Sanders
11/12/2015		Event Result: The following event: Rule 56 Hearing scheduled for 11/12/2015 02:00 PM has been resulted as follows: Result: Rescheduled Reason: Not reached by Court	Sanders
11/20/2015		Event Result: The following event: Motion Hearing to Amend Complaint scheduled for 11/20/2015 10:00 AM has been resulted as follows: Result: Held as Scheduled	Sanders
11/20/2015		The following form was generated: Notice to Appear Sent On: 11/20/2015 11:29:53	
12/01/2015	45	1CD received from Approved Court Transcriber Donna Holmes for November 20, 2015	
12/21/2015		Matter taken under advisement The following event: Rule 56 Hearing scheduled for 12/21/2015 11:00 AM has been resulted as follows: Result: Held - Under advisement	Sanders
12/21/2015		Matter taken under advisement The following event: Motion Hearing to Amend Complaint scheduled for 12/21/2015 11:00 AM has been resulted as follows: Result: Held - Under advisement	Sanders
12/30/2015	46	Plaintiff G4S Technology LLC's EMERGENCY Motion to Reconsider the Application of MGL c. 30 sec 39G	
12/31/2015	47	Opposition to paper #46.0 Motion to Reconsider "G4S Technology LLC's Motion to Reconsider the Applicability of MGL C .30 sec 39G filed by Mass Technology Park Corp	
01/05/2016		Endorsement on Motion to reconsider the applicability of MGL c. 30 Sec. 39G (#46.0): DENIED Briefing in the case has long since closed and arguments postponed at least once before this move was ever mentioned. (entered 1/4/16) notices mailed 1/4/16	Sanders
01/14/2016	48	1 CD received from Approved Court Transcriber Donna Holmes for December 21, 2015	
03/30/2016		Endorsement on Motion to (#38.0): amend complaint to sekk recovery in quantum meruit DENIED on grunds of fertility. See Memorandum of Decision of todays dated. Dated: 3/29/16 Notice sent 3/29/16	Sanders
03/30/2016		Endorsement on Motion for summary judgment, MRCP 56 (#39.0): filed by Defendants Other action taken Allowed as to G4S' claims against MTPC, Denied as to remainder. See the Memorandum of Decision.	Sanders

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

03/30/2016	49	MEMORANDUM & ORDER: OF DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT: CONCLUSION AND ORDER - Accordingly, for the foregoing reasons, the Motion for Summary Judgment brought by Massachusetts Technology Park Corporation is ALLOWED as to G4S Technology LLC's Complaint but DENIED as to the counterclaims. Dated: March 29, 2016 Notice sent 3/29/16	Sanders
05/02/2016		Attorney appearance On this date Jason P. Rogers, Esq. dismissed/withdrawn as Private Counsel for Plaintiff G4S Technology LLC	
07/15/2016	50	Plaintiff G4S Technology LLC's Motion for separate and final judgment (w/opposition)	
09/26/2016	51	Plaintiff G4S Technology LLC's Memorandum in advamce to Status Conference	
09/27/2016		Event Result: The following event: Conference to Review Status scheduled for 09/27/2016 02:00 PM has been resulted as follows: Result: Held as Scheduled	Sanders
09/27/2016		The following form was generated: Notice to Appear Sent On: 09/27/2016 15:35:04	
09/30/2016	53	Defendant Mass Technology Park Corp's Response to "Plaintiff's Status Conference Memorandum"	
10/03/2016	52	General correspondence regarding Response to plff's status conference memorandum Applies To: Mass Technology Park Corp (Defendant)	
10/21/2016		Event Result: The following event: Rule 56 Hearing scheduled for 11/30/2016 02:00 PM has been resulted as follows: Result: Rescheduled Reason: By Court prior to date	Sanders
10/21/2016		The following form was generated: Notice to Appear Sent On: 10/21/2016 14:14:25	
11/08/2016	54	Defendant Mass Technology Park Corp's Motion for summary judgment, MRCP 56 as to its Counterclaims (w/opposition)	
11/08/2016	55	Affidavit of Riley Kilmer in support of Defendant-in-Counterclaims' opposition to Plaintiff-in-Counterclaim's motion for summary judgment	
11/17/2016	56	Plaintiff G4S Technology LLC's Motion for partial Summary Judgment as to deft's counterclaims for relief pursuant to G L c 93A 11 and for indemnification (w/opposition)	

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

11/17/2016		Attorney appearance On this date Christopher Weld, Jr., Esq. added for Plaintiff G4S Technology LLC	
11/17/2016		Attorney appearance On this date Megan C. Deluhery, Esq. added for Plaintiff G4S Technology LLC	
11/17/2016		Attorney appearance On this date Marla Davis, Esq. added for Plaintiff G4S Technology LLC	
11/17/2016	57	Affidavit of Maria T Davis	
11/22/2016		Matter taken under advisement The following event: Rule 56 Hearing scheduled for 11/22/2016 09:00 AM has been resulted as follows: Result: Held - Under advisement	Sanders
01/30/2017		Endorsement on Motion for separate and final judgment (#50.0): or in the alternative to report the issue for appeal pursuant to Mass. R. Civ. P. 64 Other action taken This motion is MOOT in light of the court's decision dated 1/30/17 which disposes of any remaining claims. Dated: 1/30/17 Notice sent 1/30/17	Sanders
01/30/2017		Endorsement on Motion for summary judgment, MRCP 56 (#54.0): as to counterclaims DENIED (See Memorandum of Decision) Dated: 1/30/17 Notice sent 1/30/17	Sanders
01/30/2017		Endorsement on Motion for summary judgment, MRCP 56 (#56.0): (Partial Summary Judgment) as to Defendant's counterclaims for relief pursuant to G.L. c. 93A, Sec. 11 and for indemnification ALLOWED (See Memorandum of Decision) Dated: 1/30/17 Notice sent 1/30/17	Sanders
01/30/2017	58	MEMORANDUM & ORDER: OF DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT: CONCLUSION AND ORDER - For all the foregoing reasons, MTPC's Motion for Summary Judgment on its Counterclaim is DENIED and G4S's Motion is ALLOWED. It is hereby ORDRED that the remaining counts in the Counterclaim for fraud and a violation of G.L. c. 93A, Sec. 11 are DISMISSED, with prejudice. Dated: January 30, 2017 Notice sent 1/30/17	Sanders
01/31/2017	59	JUDGMENT It is Ordered:MTPC's motion for Summary Judgment on its Counterclaim is DENIED and G4S's motion is ALLOWED It is hereby Ordered that the remaining counts in the Counterclaim for fraud and a violation of GL c93A II are Dismissed wit prejudice entered on docket pursuant to Mass R Civ P 58(a) as amended and notice sent to parties pursuant to Mass R Civ P 77(d)	Sanders
02/13/2017	60	Defendant's Notice of intent to file motion to alter or amend judgment and motion to dismiss its unadjudicated counterclaims without perjudice Applies To: Mass Technology Park Corp (Defendant)	
02/14/2017	61	Plaintiff's Notice of intent to file motion to amend judgment pursuant to Mass. R. Civ. P. 59(e) to reflect complete disposition of all claims and counterclaims Applies To: G4S Technology LLC (Plaintiff)	

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

02/22/2017	62	Plaintiff G4S Technology LLC's Motion to amend the Judgment Pursuant to Mass. R. Civ. P. 59(e) to reflect complete disposition of all Claims and Counterclaims (w/opposition)	
02/23/2017	63	Defendant Mass Technology Park Corp's Motion to Alter or Amend Judgment Pursuant to Mass. R. Civ. P. 59(E) (w/opposition)	
02/23/2017	64	Defendant Mass Technology Park Corp's Motion to dismiss its Unadjudicated Counterclaims without prejudice pursuant to Mass. R. Civ. P. 41(A)(2) (w/opposition)	
03/03/2017		Event Result: The following event: Rule 12 Hearing scheduled for 03/03/2017 02:30 PM has been resulted as follows: Result: Held as Scheduled	Sanders
03/03/2017		Event Result: The following event: Motion Hearing scheduled for 03/03/2017 02:30 PM has been resulted as follows: Result: Held as Scheduled	Sanders
03/06/2017		Endorsement on Motion to Amend Judgment Pursuant to MRCP 59(e) to reflect Complete Disposition of All Claims and Counterclaims (#62.0): DENIED See endorsement on paper #63) (dated 3/3/17) notice sent 3/6/17	Sanders
03/06/2017		Endorsement on Motion to Alter or Amend Judgment Pursuant to MRCP 59(e) (#63.0): ALLOWED (dated 3/3/17) notice sent 3/6/17	Sanders
03/06/2017		Endorsement on Motion to Dismiss it Unadjudicated Counterclaims Without Prejudice Pursuant to MRCP 41(A)(2) (#64.0): ALLOWED (dated 3/3/17) notice sent 3/3/17	Sanders
03/28/2017	65	FINAL JUDGMENT entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pursuant to Mass R Civ P 77(d)	Sanders
03/28/2017		Disposed for statistical purposes	
03/29/2017	66	Notice of appeal filed. Applies To: G4S Technology LLC (Plaintiff)	
04/07/2017	67	Notice of appeal filed. Applies To: Mass Technology Park Corp (Defendant)	
04/11/2017	68	Court received letter regarding transcripts ordered related to appeal Two of the needed transcripts are already on the docket. One additional transcript has already been prepared, and the transcriber who prepared it has been asked to send a copy to the court. Applies To: Davis, Esq., Maria (Attorney) on behalf of G4S Technology LLC (Plaintiff)	
04/14/2017	69	1 CD containing PDF Transcript of 9/27/16 received from Approved Court Transcriber Donna Holmes Dominguez.	
04/19/2017	70	Court received letter regarding transcripts related to appeal Applies To: Kaler, Esq., Robert J (Attorney) on behalf of Mass Technology Park Corp (Defendant)	

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

04/21/2017	71	1 CD containing PDF Transcripts of May 27, 2015, November 20, 2015, and March 3, 2017 received from Court Approved Transcriber Donna Holmes Dominguez.
04/21/2017	72	1 CD received from Court Approved Transcriber Donna Holmes Dominguez for November 22, 2016
07/14/2017		Appeal: notice of assembly of record
07/24/2017	73	Notice of docket entry received from Appeals Court In accordance with Massachusetts Rule of Appellate Procedure 10 (a) (3), please note that the above-referenced case (2017-P-0950) was entered in this Court on 7/21/17.

I HEREBY ATTEST AND CERTIFY ON 7/25/17, THAT THE FOREGOING DOCUMENT IS A FULL, TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE, AND IN MY LEGAL CUSTODY.

MICHAEL JOSEPH DONOVAN
CLERK / MAGISTRATE
SUFFOLK SUPERIOR CIVIL COURT
DEPARTMENT OF THE TRIAL COURT

BY: Margaret M. Sullivan
Assistant Clerk

4

Agreement Between Owner and Design-Builder

This **AGREEMENT** is made as of the 30th day of June the year of 2011 ("Effective Date") by and between the following parties, for services in connection with the Project identified below.

OWNER: Massachusetts Technology Park Corporation, 75 North Drive, Westborough, MA 01581, an independent public instrumentality of the Commonwealth of Massachusetts, established, organized, and existing pursuant to Chapter 40J of the Massachusetts General Laws and doing business as the **Massachusetts Technology Collaborative** acting in accordance with G. L. c. 40J, § 6B **("Owner" or "MTC")**

DESIGN-BUILDER: **G4S Technology LLC ("Design-Builder")** with its principal place of business located at 1200 Landmark Center, Omaha NE 68102

PROJECT: ***MassBroadband 123*** **Fiber Optic Network Final Design and Construction**

In consideration of the mutual covenants and obligations contained herein, Owner and Design-Builder agree as set forth herein.

Article 1

Scope of Work

1.1 Design-Builder shall perform all design and construction services, and provide all material, tools and labor necessary to complete the Project in accordance with Owner's Project Criteria as set forth in the Contract Documents. Design-Builder shall also coordinate its Work with Owner's Project Manager and other contractors in accordance with the Contract Documents. Owner and Design-Builder will mutually coordinate performance of their respective obligations.

1.2 Design-Builder's Design-Build Manager on the Project shall be Scott Mailman. If, for reasonable cause, Owner withdraws its approval of such individual as such Design-Build Manager, Design-Builder shall promptly name a different Design-Build Manager, subject to Owner's approval. Any disapproved Design-Build Manager shall not perform in that capacity thereafter on the Project. Owner shall give Design-Builder notice and reasonable opportunity to cure any deficiencies before withdrawing its approval of the Design-Build Manager.

1.3 Owner's Representative on the Project shall be the Project Manager from Tilson Fiber Technology, LLC ("OPM") assigned to the Project. Unless otherwise directed in writing by Owner, Design-Builder shall direct all communications relating to the Project to the OPM. The OPM does not have the authority to enter into or approve a change in the contract or to extend the contract time. There shall be no change in the contract time without the express written consent and agreement of Owner. The Program Director of Massachusetts Broadband Institute

Article 4

Contract Time

4.1 Date of Commencement. The Work shall commence on, and the "Date of Commencement" shall be, the date to be specified by Owner in a written Notice to Proceed. It is anticipated that the Notice to Proceed shall be delivered on or before July 1, 2011. In the event of delay in issuance of the Notice to Proceed not caused in whole or in part by Design-Builder, the Design-Builder shall be given either a one day extension of time to complete the project for every day that the notice to proceed is delivered after the aforementioned date or an equitable adjustment in the Contract Price for the cost of acceleration, the selection of which shall be Owner's sole decision.

4.2 Mandatory Milestones, Substantial Completion and Final Completion. Design-Builder shall achieve the following Mandatory Milestones:

4.2.1 Design-Builder shall complete fifty-five percent (55%) of the value of the Work by June 30, 2012 (the "55% Milestone").

4.2.2 Design-Builder shall achieve Substantial Completion by April 15, 2013 (the "Date for Substantial Completion").

4.2.3 Design-Builder shall achieve Final Completion by June 30, 2013 (the "Date for Final Completion").

4.3 Time is of the Essence. Owner and Design-Builder mutually agree that time is of the essence with respect to the dates and times set forth in the Contract Documents.

4.4 Delay Damages. Design-Builder acknowledges that, if any date for a Mandatory Milestone listed above is not attained as a result of any failure of Design-Builder to perform, Owner will suffer damages that are difficult to determine and specify accurately. Design-Builder agrees that if any Date for a Mandatory Milestone, after adjustment for any extensions of time to which Design-Builder is entitled under the Contract Documents, is not attained as a result of any failure of Design-Builder to perform, then Design-Builder shall pay Owner, as part of compensatory delay damages and not as a penalty, for each Day or part thereof that achievement of the Mandatory Milestone extends beyond the Date for the applicable Mandatory Milestone, the following amount(s):

4.4.1 For failure to attain the 55% Milestone, Two Thousand Dollars ($2,000.00); and

4.4.2 For failure to attain Substantial Completion by the Date for Substantial Completion, Seven Thousand Five Hundred Dollars ($7,500.00) until June 30, 2013; thereafter Nine Thousand Five Hundred Dollars ($9,500.00); and

4.4.3 For failure to attain Final Completion by the Date for Final Completion, Three Thousand Dollars ($3,000.00).

Liability for compensatory delay damages hereunder for each Mandatory Milestone shall be calculated separately, and, in the event that more than one Mandatory Milestone is not attained and that the periods of later achievement overlap, the daily rates shall be additive for the periods of overlap. The compensatory delay damages provided herein shall be Owner's sole remedy for

any failure of Design-Builder to meet the above dates, except as otherwise provided in Section 4.6.

4.5 Partial Rebate of Compensatory Delay Damages.

4.5.1 In the event Design-Builder incurs compensatory delay damages for late achievement of the 55% Milestone under Section 4.4.1 but attains Substantial Completion and Final Completion by the Date(s) for Substantial Completion and Final Completion respectively without Owner having ordered Extraordinary Measures (as defined in the General Conditions), Owner shall credit Design-Builder half of the amount of compensatory delay damages liability incurred under Section 4.4.1 on account of the late achievement of the 55% Milestone.

4.5.2 In the event Design-Builder incurs compensatory delay damages at the $7,500.00 a day level under Section 4.4.2, but attains both Substantial Completion and Final Completion by the Date for Final Completion without Owner having ordered Extraordinary Measures (as defined in the General Conditions), Owner shall credit Design-Builder one half (1/2) of the amount of compensatory delay damages liability incurred under Section 4.4.2 at the $7,500.00 a day level.

4.6 Delay Damages Related to Loss of Grant Funding.

In the event Owner suffers damages arising from loss of funding from the Grant as a result of any failure of Design-Builder to meet the above dates, such damages are not included in the foregoing compensatory delay damages and Owner may recover, in addition to such compensatory delay damages, the amount of funding from the Grant that Owner is unable to collect to the extent caused by delay for which Design-Builder is responsible subject, however, to a maximum of $5,000,000 for this category of damages.

4.7 Reservation of other Direct Damages.

Nothing in this Article shall diminish the right of Owner to exercise any other rights and remedies under the Contract Documents for Design-Builder's breach.

Article 5

Contract Price

5.1 Contract Price. Owner shall pay Design-Builder in accordance with Article 6 of the General Conditions of Contract the sum of Forty-Seven Million Two Hundred Twenty-Three Thousand Two Hundred Ninety-One Dollars and Thirty Cents ($47,223,291.30) ("Contract Price"), subject to adjustments made in accordance with the General Conditions of Contract. Unless otherwise provided in the Contract Documents, the Contract Price is deemed to include all sales, use, consumer and other taxes mandated by applicable Legal Requirements.

5.2 Schedule of Values. Prior to starting the Work, Design-Builder shall submit to Owner a schedule of values allocated to the various parts of the Work, aggregating the Contract Price, made out in such detail and format as Owner requires, and supported by such evidence as Owner may require. The schedule of values shall be subject to written approval by Owner. In applying

for payment, Design-Builder shall submit statements based upon the approved schedule of values.

Article 6

Procedure for Payment

6.1 Periodic Payments

6.1.1 Design-Builder shall submit to Owner for approval on the first (1st) day of each month after the Commencement Date Design-Builder's Application for Payment in accordance with Article 6 of the General Conditions of Contract, the Measurement and Payment Standards in Exhibit I.1. All such Applications shall be accompanied by a progress payment release in the form attached hereto as **Exhibit B-1** and progress payment releases in the form attached hereto as **Exhibit B-2** from each Design Consultant and each Subcontractor identified in a Schedule of Design Consultants and Subcontractors submitted pursuant to Section 2.1.8 of the General Conditions of Contract, and such other documents as may be required by the Project Manual.

6.1.2 Owner shall approve or reject, in whole or in part, Design-Builder's applications for a periodic payment no later than fifteen (15) days after receipt. Owner shall make payment of an approved application for payment fifteen (15) days after approval by Owner, unless and to the extent properly and validly rejected in writing prior to that time, but in each case less retainage of five percent (5%) of the total amount approved on the Application for Payment, and less amounts properly withheld under Article 6 of the General Conditions of Contract including any compensatory delay damages assessed under Section 4.4.

6.1.3 Owner shall pay Design-Builder, within thirty (30) days after issuance of a Notice to Proceed, an Initial Payment in the amount of One Million Two Hundred Thousand Dollars ($1,200,000) to be used for, and only for the purpose of, defraying initial cash costs of the Design-Builder for the Work. Owner shall credit one-sixth (1/6) of that amount, *i.e.*, Two Hundred Thousand Dollars ($200,000), against the amount that would otherwise be due and payable under the terms of the Contract Documents (other than this paragraph) on each of the first six (6) applications for periodic payment. In the event Owner terminates the Agreement before the full amount of the Initial Payment has been credited back to Owner, Design-Builder shall pay Owner any amount not so credited forthwith upon termination.

6.2 Final Payment. Design-Builder shall submit to Owner its Application for Final Payment for the balance of the Contract Price in accordance with Section 6.5 of the General Conditions of Contract. Owner shall make payment on Design-Builder's properly submitted and accurate Application for Final Payment within thirty-five (35) days after Owner's receipt of the Application for Final Payment, provided that Design-Builder has satisfied the requirements for final payment set forth in Section 6.5 of the General Conditions of Contract and all other conditions of the Contract Documents, and has provided Owner fully executed Final Payment Certificate and Release and Final Design Consultant and Subcontractor Releases in the forms of **Exhibit C-1** and **Exhibit C-2** hereto respectively.

Article 9

Execution

In executing this Agreement, Owner and Design-Builder each individually represents and warrants that it has, and will continue to have through Final Completion, the necessary financial resources to fulfill its obligations under this Agreement, and each has the necessary corporate approvals to execute this Agreement, and perform the services described herein.

OWNER:
Massachusetts Technology Collaborative

(Signature)

(Printed Name)

(Title)

Date:

DESIGN-BUILDER:
G4S Technology LLC

(Signature)
Robert E. Sommerfeld
(Printed Name)
President
(Title)
Date: June 30, 2011

Exhibit A

General Conditions of Contract Between Owner and Design-Builder

unconditionally transferring title to the materials and equipment to Owner.

6.1.2 Design-Builder shall mark and identify the subject materials and shall segregate from and shall not commingle such goods with other goods held by Design-Builder or the Subcontractor.

6.1.3 Title to any materials and equipment furnished by Design-Builder that does not pass to Owner by a Bill of Sale given pursuant to this Section 6.1 shall transfer to Owner upon installation thereof or payment therefor, whichever occurs first. Transfer of title shall be without prejudice to Owner's right to reject any non-conforming or defective materials or equipment or to exercise any other rights and remedies with respect thereto.

6.2 Withholding of Payments

6.2.1 On or before the date established in the Agreement, Owner shall pay Design-Builder all amounts properly due. If Owner determines that Design-Builder is not entitled to all or part of an Application for Payment, it will notify Design-Builder in writing at least five (5) days prior to the date payment is due. The notice shall indicate the specific amounts Owner intends to withhold, the reasons and contractual basis for the withholding, and the specific measures Design-Builder must take to rectify Owner's concerns. Design-Builder and Owner will attempt to resolve Owner's concerns prior to the date payment is due. If the parties cannot resolve such concerns, Design-Builder shall proceed with the Work reserving its rights and under protest, and Owner shall be obligated to pay all undisputed sums. Any continued dispute shall be subject to mediation under Subparagraph 11.10 hereunder.

6.2.2 Notwithstanding anything to the contrary in the Contract Documents, Owner shall pay Design-Builder all undisputed amounts in an Application for Payment within the times required by the Agreement.

6.3 Design-Builder's Payment Obligations

6.3.1 Design-Builder will pay Design Consultants and Subcontractors, in accordance with its contractual obligations to such parties and subject to any provisions of such contracts regarding the withholding of sums from any subcontractor or design consultants for their non-compliance with or non-performance of their contracts, all the amounts Design-Builder has received from Owner on account of their work. Design-Builder will impose similar requirements on Design Consultants and Subcontractors to pay those parties with whom they have contracted.

6.3.2 To the fullest extent permitted by law, Design-Builder agrees to indemnify, defend, and hold harmless, the Owner, the OPM, the Commonwealth of Massachusetts' Executive Office of Public Safety and Security and Commonwealth of Massachusetts' Information Technology Division from all liens, claims and demands, and all expenses incurred, including attorneys' fees and costs of defense with counsel acceptable to the Owner, for or on account of or in any way arising from (a) the Work of the Design-Builder or others claiming by, through or under the Design-Builder, (b) for payment of any labor performed or material or equipment furnished in connection with improvements to real property or related to the Project, or (c) for any breach of contract by the Design-Builder or any Design Consultant, Subcontractor and/or supplier and/or vendor of the Design-Builder. In addition, at the

Owner's option and direction, the Design-Builder shall be obligated to obtain and record and/or file, within fifteen (15) days after demand by the Owner, a bond discharging any lien claim asserted by any party claiming by, through or under the Design-Builder in accordance with applicable law as set forth in Section 7.2 hereof. Any liability of Design-Builder hereunder shall be reduced to the extent of any amounts due and overdue for payment by Owner.

6.4 Substantial Completion

6.4.1 Design-Builder shall notify Owner when it believes the Work, or to the extent permitted in the Contract Documents, a portion of the Work, is substantially complete. Within five (5) days of Owner's receipt of Design-Builder's notice, Owner and Design-Builder will jointly inspect such Work to verify that it is substantially complete in accordance with the requirements of the Contract Documents. If such Work is substantially complete, Owner shall prepare and issue a Certificate of Substantial Completion that will set forth (i) the date of Substantial Completion of the Work or portion thereof, (ii) the remaining items of Work that have to be completed before Final Completion, (iii) provisions (to the extent not already provided in the Contract Documents) establishing Owner's and Design-Builder's responsibility for the Project's security, maintenance, utilities and insurance pending the final milestone payment and (iv) an acknowledgment that warranties commence to run on the date of Substantial Completion, except as may otherwise be noted in the Certificate of Substantial Completion.

6.4.2 Owner, at its option, may use a portion of the Work which has been determined to be substantially complete, provided, however, that (i) a Certificate of Substantial Completion has been issued for the portion of Work addressing the items set forth in Section 6.2.1 above.

6.5 Final Payment

6.5.1 When the conditions for Final Completion have occurred, the Design-Builder shall so certify to Owner and may then request Final Completion.

6.5.2 Upon receipt of a certification of and request for Final Completion, Owner will either issue the Certificate of Final Completion or advise Design-Builder of requirements that must be met before the Project can be considered ready for Final Completion.

6.5.3 When Owner issues the Certificate of Final Completion, Design-Builder shall submit the Application for Final Payment.

6.5.4 After Owner issues a Certificate of Final Completion and receives an Application for Final Payment from Design-Builder that complies with all requirements applicable thereto, Owner shall make Final Payment by the time required in the Agreement, provided that Design-Builder has completed all of the Work in conformance with the Contract Documents and as required by the Agreement including all warranty and repair requirements and issue Final Payment Certificate.

6.5.5 No later than the time of submission of its Application for Final Payment, Design-Builder shall provide the following information and documents:

6.5.5.1 An affidavit that there are no claims, obligations or liens outstanding or unsatisfied for labor, services, material, equipment, taxes or other items performed, furnished or incurred for or in connection

consecutive days or aggregate more than sixty (60) days during the duration of the Project.

10.1.2 Design-Builder is entitled to an adjustment of the Contract Price and/or Contract Time(s) if its cost or time to perform the Work has been adversely impacted by any suspension of stoppage of Work by Owner.

10.2 Owner's Right to Perform and Terminate for Cause

10.2.1 If Design-Builder persistently fails to (i) provide a sufficient number of skilled workers, (ii) supply the materials required by the Contract Documents, (iii) comply with applicable Legal Requirements, (iv) timely pay, without cause, Design Consultants or Subcontractors, (v) prosecute the Work with promptness and diligence to ensure that the Work is completed by the Contract Time(s), as such times may be adjusted, or (vi) perform material obligations under the Contract Documents, then Owner, in addition to any other rights and remedies provided in the Contract Documents or by law, shall have the rights set forth in Sections 10.2.2 through 10.2.4 below.

10.2.2 Upon the occurrence of an event set forth in Section 10.2.1 above, Owner may provide written notice to Design-Builder that it intends to terminate the Agreement unless the problem cited is cured, or commenced to be cured, within seven (7) days of Design-Builder's receipt of such notice. If Design-Builder fails to cure, or reasonably commence to cure, such problem, then Owner may give a second written notice to Design-Builder of its intent to terminate within an additional seven (7) day period. If Design-Builder, within such second seven (7) day period, fails to cure, or reasonably commence to cure, such problem, then Owner may declare the Agreement terminated for default by providing written notice to Design-Builder of such declaration.

10.2.3 If Design-Builder fails to promptly commence and continue satisfactory correction of such problem, Owner may, with or without terminating the Agreement, (a) cause to be performed by others any part of Design-Builder's Work or obligations to cure or correct such problem; (b) withhold payment otherwise due to Design-Builder; (c) take such measures as it deems prudent to mitigate the effects of such failure to correct; and (d) charge Design-Builder for all costs and expenses, including attorneys' fees, resulting therefrom.

10.2.4 Upon declaring the Agreement terminated pursuant to Section 10.2.2 above, Owner may enter upon the premises and take possession, for the purpose of completing the Work, of all materials, equipment, scaffolds, tools, appliances and other items thereon, which have been purchased for the Project, all of which Design-Builder hereby transfers, assigns and sets over to Owner for such purpose, and to employ any person or persons to complete the Work and provide all of the required labor, services, materials, equipment and other items. In the event of such termination, Design-Builder shall not be entitled to receive any further payments under the Contract Documents until the Work shall be finally completed in accordance with the Contract Documents. At such time, if the unpaid balance of the Contract Price exceeds the cost and expense incurred by Owner in completing the Work, such excess shall be paid by Owner to Design-Builder. If Owner's cost and expense of completing the Work exceeds the unpaid balance of the Contract Price, then Design-Builder shall be obligated to pay the

Exhibit B-1

Form of Design-Builder Progress Payment Release

EXHIBIT B-1
Design-Builder Progress Payment Release

PROJECT: **MassBroadband 123 Fiber Optic Network Design-Build**
OWNER: **Massachusetts Technology Collaborative**
DESIGN-BUILDER: **********

Date: _____ Period covered by application for payment: _____

Amount Requested: _____

The undersigned warrants, represents and guarantees:

A. That the Amount Requested constitutes the entire value of all work billed ("work") which term shall include without limitation labor, materials and equipment furnished and all other services which would entitle any person to any lien by, through or under the undersigned with respect to the Project through the date hereof;

B. That all work covered by such Amount Requested has been incorporated into the Project and title thereto has passed to the Owner, or, in the case of materials and equipment stored at the site or at some other location previously agreed to by the Owner, title will pass to the Owner upon receipt of the Amount Owed by the undersigned, in each case free and clear of all chattel liens, claims, security, interests or encumbrances;

C. That no work covered by such Amount Requested will have been acquired subject to any agreement under which any interest therein or an encumbrance thereon is retained by the seller or any other person. Without limiting any other undertaking or agreement, the undersigned agrees to indemnify, defend and hold harmless Owner and its lender(s) from and against all claims, damages, losses and expenses (including attorneys' fees and costs of defense) resulting from any mechanic's lien asserted against the Project arising from work performed by, through, on behalf of or under contract with the undersigned, except that such obligation with respect to liens arising from labor, materials or equipment covered by the Amount Request is expressly conditioned upon payment of such amounts by Owner. Without limiting any other undertaking or agreement, the undersigned agrees, upon request of Owner, to promptly obtain a bond discharging any asserted mechanic's lien by a design consultant, Subcontractor or or supplier of Design-Builder pursuant to applicable law;

D. The undersigned hereby certifies to Owner that all laborers, mechanics and others providing labor or services by or through the undersigned have been paid all wages due them and that all taxes, insurances, fringes, contributions and assessments required by law or by contract that are a function of wages have been paid in full up to the date hereof, and that the undersigned is in compliance with all federal, state, and local wage hour and tax laws, including but not limited to FICA, FUTA, SUTA and Worker's Compensation laws, up to the date hereof;

E. The undersigned hereby represents and warrants that all subcontractors, suppliers and equipment providers of the undersigned have been paid in full all amounts due to them up to the date of this Certification, and that the sums received in payment for the Amount Requested shall be used to forthwith pay in full all amounts due to such subcontractors, suppliers and equipment providers up to the date hereof, excluding only the value of any Pending Changes and Disputed Claims submitted in accordance with the General Conditions of the Contract.

Executed as a sealed instrument this _____ day of _____, 201__.

****

By: _____

Title: _____

Printed Name: _____

Exhibit F

Special Terms and Conditions

EXHIBIT F

Special Terms and Conditions for

Design-Builder Services for *MassBroadband 123* Project

The following provisions, whether referenced or set forth below, are incorporated into the Agreement between MTC and the Design-Builder as if set forth in full therein. The Design-Builder shall incorporate this Exhibit F into all Subcontracts and all agreements with Design Consultants. In the event of a conflict between this Exhibit and the Agreement, this Exhibit shall govern.

1. All work to which this Attachment applies shall be performed in accordance with Financial Assistance Award made by the United States Department of Commerce ("DoC") to the Owner, Award Number NT10BIX5570070 (the "Grant"), and all the documents referenced in the Grant as governing, conditioning or otherwise requiring compliance on the part of MTC.

2. The Grant awarded to MTC is subject to Subpart C of 2 CFR Part 1326, "Governmentwide Debarment and Suspension (Nonprocurement)."

3. Byrd Anti-Lobbying Amendment

This contract exceeds $100,000 and is subject to 31 U.S.C. § 1352, as implemented at 15 CFR Part 28, "New Restrictions on Lobbying." The Design-Builder shall, and shall require all subcontractors whose subcontract exceeds $100,000 to, (a) certify to the MTC that it will not and have not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award; and (b) submit a completed "Disclosure of Lobbying Activities" (Form SF-LLL) regarding the use of non-Federal funds for lobbying. The Form SF-LLL shall be submitted within 15 days following the end of the calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed. The Form SF-LLL shall be submitted from tier to tier until received by MTC.

4. The DoC encourages recipients to utilize minority and women-owned firms and enterprises in contracts under financial assistance awards. The Minority Business Development Agency will assist recipients in matching qualified minority owned enterprises with contract opportunities. For further information contact:

U.S. Department of Commerce
Minority Business Development Agency
Herbert C. Hoover Building
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Design-Builder shall submit periodic reports to Owner with records indicating the total hours worked by all journeymen and apprentices in positions subject to the apprentice requirement. In any instance in which the apprentice hours do not constitute 5 per cent of the total hours of employees subject to the apprentice requirement, the contractor shall submit a plan to the awarding authority describing how the contractor shall comply with the apprentice requirement.

Section 40: Design-Builder and all Subcontractors and Design Consultants of any tier shall post notices of available employment opportunities to the Commonwealth of Massachusetts's job bank or the one-stop career centers closest to where the Work of the Project is located. The postings shall contain such information as directed by the Massachusetts Secretary of Labor and Workforce Development. Design-Builder shall comply with any regulations issued by said Secretary to effectuate this job posting requirement.

21. Provisions of or Adapted from Massachusetts General Laws

The following provisions of or adapted from Massachusetts General Laws are incorporated into Design-Build agreement and take precedence over any other provisions thereof that may be inconsistent with the provisions below.

References below to "contractor" or "general contractor" shall mean the Design-Builder.

References below to "awarding authority" shall mean Owner.

Ch. 30 Section 39B:

Dump trucks, so called, will be hired from common or contract carriers for use in the prosecution of such contract or for the delivery or transportation of materials to be incorporated in the Work at applicable rates and transportation charges prescribed by the Massachusetts Department of Telecommunications and Energy with respect to such common carriers and contract carriers who engage in dump-truck operations.

"Transportation charges", as used herein, shall be defined as any charge prescribed or authorized by the Massachusetts Department of Telecommunications and Energy to be paid to the owner of a dump truck who holds a certificate as a common carrier or a permit as a contract carrier whether such charge is based on an hourly rental basis, cubic yard per mile basis, ton per mile basis, or any other basis approved and authorized by said department of telecommunications and energy which is applicable to any such contract.

On contracts where payment of transportation charges is being made on a cubic yard-mileage or ton-mileage basis, if any dispute shall arise between a common or contract carrier and a contractor, sub-contractor or materials supplier as to the proper mileage or carrying capacity of any vehicle on which payment is based, such dispute may be referred by either party to MTC for decision. In such cases MTC shall cause the mileage from the loading point or source of supply to the nearest point of delivery on said contract to be computed, or shall cause the carrying capacity of such vehicle to be measured and determined. Such determination of facts shall be

sought to be consolidated and that such consolidation will prevent unnecessary duplication of evidence. A decree in any such proceeding shall not include interest on the disputed amount deposited in excess of the interest earned for the period of any such deposit. No person except a subcontractor filing a demand for direct payment for which no funds due the general contractor are available for direct payment shall have a right to file a petition in court of equity against the awarding authority claiming a demand for direct payment is premature and such subcontractor must file the petition before the awarding authority has made a direct payment to the subcontractor and has made a deposit of the disputed portion as provided in part (iii) of subparagraph (e) and in subparagraph (f) of paragraph (1).

(5) In any petition to collect any claim for which a subcontractor has filed a demand for direct payment the court shall, upon motion of the general contractor, reduce by the amount of any deposit of a disputed amount by the awarding authority as provided in part (iii) of subparagraph (e) and in subparagraph (f) of paragraph (1) any amount held under a trustee writ or pursuant to a restraining order or injunction.

Ch. 30 Section 39G

Upon substantial completion of the Work the contractor shall present in writing to the awarding authority its certification that the work has been substantially completed. Within twenty-one (21) days thereafter, the awarding authority shall present to the contractor either a written declaration that the work has been substantially completed or an itemized list of incomplete or unsatisfactory work items required by the contract sufficient to demonstrate that the work has not been substantially completed. The awarding authority may include with such list a notice setting forth a reasonable time, which shall not in any event be prior to the contract completion date, within which the contractor must achieve substantial completion of the work. In the event that the awarding authority fails to respond, by presentation of a written declaration or itemized list as aforesaid, to the contractor's certification within the twenty-one (21) day period, the contractor's certification shall take effect as the awarding authority's declaration that the work has been substantially completed.

Within sixty-five (65) days after the effective date of a declaration of a substantial completion, the awarding authority shall prepare and forthwith send to the contractor for acceptance a substantial completion estimate for the quantity and price of the work done and all but one per cent (1%) retainage on that work, including the quantity, price and all but one per cent (1%) retainage for the undisputed part of each work item and extra work item in dispute but excluding the disputed part thereof, less the estimated cost of completing all incomplete and unsatisfactory work items and less the total periodic payments made to date for the work. The awarding authority also shall deduct from the substantial completion estimate an amount equal to the sum of all demands for direct payment filed by subcontractors and not yet paid to subcontractors or deposited in joint accounts pursuant to Mass. G.L. Ch. 30 Section 39F as set forth above.

If the awarding authority fails to prepare and send to the contractor any substantial completion estimate required by this section on or before the date herein above set forth, the awarding authority shall pay to the contractor interest on the amount which would have been due to the contractor pursuant to such substantial completion estimate at the rate of three (3) percentage points above the rediscount rate then charged by the Federal Reserve Bank of Boston from such

date to the date on which the awarding authority sends that substantial completion estimate to the contractor for acceptance or to the date of payment therefor, whichever occurs first. The awarding authority shall include the amount of such interest in the substantial completion estimate.

Within fifteen (15) days after the effective date of the declaration of substantial completion, the awarding authority shall send to the contractor by certified mail, return receipt requested, a complete list of all incomplete or unsatisfactory work items, and, unless delayed by causes beyond its control, the contractor shall complete all such work items within forty-five (45) days after the receipt of such list or before the then contract completion date, whichever is later. If the contractor fails to complete such work within such time, the awarding authority may, subsequent to seven (7) days' written notice to the contractor by certified mail, return receipt requested, terminate the contract and complete the incomplete or unsatisfactory work items and charge the cost of same to the contractor.

Within thirty (30) days after receipt by the awarding authority of a notice from the contractor stating that all of the work required by the contract has been completed, the awarding authority shall prepare and forthwith send to the contractor for acceptance a final estimate for the quantity and price of the work done and all retainage on that work less all payments made to date, unless the awarding authority's inspection shows that work items required by the contract remain incomplete or unsatisfactory, or that documentation required by the contract has not been completed. If the awarding authority fails to prepare and send to the contractor the final estimate within thirty (30) days after receipt of notice of completion, the awarding authority shall pay to the contractor interest on the amount which would have been due to the contractor pursuant to such final estimate at the rate hereinabove provided from the thirtieth (30^{th}) day after such completion until the date on which the awarding authority sends the final estimate to the contractor for acceptance or the date of payment therefor, whichever occurs first, provided that the awarding authority's inspection shows that no work items required by the contract remain incomplete or unsatisfactory. Interest shall not be paid hereunder on amounts for which interest is required to be paid in connection with the substantial completion estimate as hereinabove provided. The awarding authority shall include the amount of the interest required to be paid hereunder in the final estimate.

The awarding authority shall pay the amount due pursuant to any substantial completion or final estimate within thirty-five (35) days after receipt of written acceptance for such estimate from the contractor and shall pay interest on the amount due pursuant to such estimate at the rate hereinabove provided from that thirty-fifth (35^{th}) day to the date of payment. Within fifteen (15) days, after receipt from the contractor, at the place designated by the awarding authority, if such place is so designated, of a periodic estimate requesting payment of the amount due for the preceding periodic estimate period, the awarding authority shall make a periodic payment to the contractor for the work performed during the preceding periodic estimate period and for the materials not incorporated in the work but delivered and suitably stored at the site, or at some location agreed upon in writing, to which the contractor has title or to which a subcontractor has title and has authorized the contractor to transfer title to the awarding authority, upon certification by the contractor that it is the lawful owner and that the materials are free from all encumbrances. The awarding authority shall include with each such payment interest on the amount due pursuant to such periodic estimate at the rate herein above provided from the due

date. In the case of periodic payments, the contracting authority may deduct from its payment a retention based on its estimate of the fair value of its claims against the contractor, a retention for direct payments to subcontractors based on demands for same in accordance with the provisions of Mass. G.L. ch. 30 Section 39F as set forth above, and a retention to secure satisfactory performance of the contractual work not exceeding five per cent (5%) of the approved amount of any periodic payment, and the same right to retention shall apply to bonded subcontractors entitled to direct payment under said Section 39F; provided, that a five per cent (5%) value of all items that are planted in the ground shall be deducted from the periodic payments until final acceptance.

No periodic, substantial completion or final estimate or acceptance or payment thereof shall bar a contractor from reserving all rights to dispute the quantity and amount of, or the failure of the awarding authority to approve a quantity and amount of, all or part of any work item or extra work item.

Substantial completion, for the purposes of this section, shall mean either that the work required by the contract has been completed except for work having a contract price of less than one per cent (1%) of the then adjusted total contract price, or substantially all of the work has been completed and opened to public use except for minor incomplete or unsatisfactory work items that do not materially impair the usefulness of the work required by the contract.

Ch. 30 Section 39I

The contractor shall perform all the Work in conformity with the plans and specifications contained in the Contract Documents. No willful and substantial deviation from said plans and specifications shall be made unless authorized in writing by the awarding authority. In order to avoid delays in the prosecution of the work required by such contract such deviation from the plans or specifications may be authorized by a written order of the awarding authority. Within thirty (30) days thereafter, such written order shall be confirmed by a certificate of the awarding authority stating: (1) If such deviation involves any substitution or elimination of materials, fixtures or equipment, the reasons why such materials, fixtures or equipment were included in the first instance and the reasons for substitution or elimination, and, if the deviation is of any other nature, the reasons for such deviation, giving justification therefor; (2) that the specified deviation does not materially injure the project as a whole; (3) that either the work substituted for the work specified is of the same cost and quality, or that an equitable adjustment has been agreed upon between the awarding authority and the contractor and the amount in dollars of said adjustment; and (4) that the deviation is in the best interest of the awarding authority.

Ch. 30 Section 39L

The awarding authority (1) shall not enter into a contract for the work with, and shall not approve as a subcontractor furnishing labor and materials for a part of the work, a foreign corporation which has not filed with the awarding authority a certificate of the state secretary stating that the corporation has complied with requirements of section 15.03 of subdivision A of Part 15 of chapter 156D and the date of compliance, and further has filed all annual reports required by section 16.22 of subdivision B of Part 16 of said chapter 156D, and (2) shall report to the Massachusetts State Secretary and to the Department of Corporations and Taxation any foreign

5

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS SUPERIOR COURT

G4S TECHNOLOGY LLC, Plaintiff, v. MASSACHUSETTS TECHNOLOGY PARK CORPORATION, Defendant.	)	CIVIL ACTION NO. 14-02998-BLS

CONSOLIDATED SUPERIOR COURT RULE 9A
STATEMENT OF UNDISPUTED MATERIAL FACTS

DEFENDANT'S SUPERIOR COURT RULE 9A STATEMENT

Set forth below is the Statement of Undisputed Facts filed by the Defendant Massachusetts Technology Park Corporation ("MTC"), and the responses of the Plaintiff G4S Technology LLC ("G4S"):

1. MTC "is a public instrumentality of the Commonwealth of Massachusetts." Complaint at 1. MTC "was awarded $45.4 million in federal funding to build MassBroadband123, a 1,200-mile fiber optic network intended to bring high-speed Internet access" to areas of western Massachusetts (the "Project"). Id. MTC was also give substantial state funding for the Project. MTC "put the Project out to public bid"; and "selected G4S as the Design-Builder" of the Project. Id. A design-build contract pursuant to which G4S was to design and build the Project "was executed by MTC and G4S, dated June 30, 2011" (the "Contract"). Id. at p. 2.

Plaintiff's Response: Undisputed.

Plaintiff's Response: Undisputed.

63. On October 31, 2012, Ms. Krantz received an email from an official of Phoenix referring to an aged accounts receivable report attached to the email, and indicating that as of that as of that date, there was an overdue receivable of $187,000 over 60 days past due for payment to Phoenix. Krantz Vol. 1, 133:9-22, Exh. 242.

Plaintiff's Response: Disputed. G4S incorporates its response to paragraph 25. Furthermore, G4S did receive the October 31, 2012 email from Phoenix, but disputes their claim that there was an overdue receivable of $187,000 at that time. On September 26, 2012, G4S sent Phoenix a letter rejecting 65 invoices due to incomplete work and requesting that Phoenix void the invoices, see Krantz Aff., ¶ 26, Exhibit M, and a second letter on October 8, 2012, rejecting an additional 6 invoices. See id., Exhibit N. On December 3, 2012, Ms. Krantz responded to a Phoenix request for payment information and in her reply, she requested that Phoenix identify the voided invoices that they would like G4S to approve.[3] See Krantz Aff., ¶ 27, Exhibit O. After receipt and review of the Phoenix list of invoices, Ms. Krantz communicated with the G4S Treasury Department's Risk Manager on December 12, 2012 and informed him that she was processing $66,975.36 for payment. See id., Exhibit P. After additional review, G4S approved and agreed to pay $138,687.73 and Phoenix, in its December 14, 2012 communication to the G4S Treasurer, agreed to extend the time for payment to January 3, 2013. See id., Exhibit Q.

64. On December 3, 2012, Ms. Krantz received another email from a representative of Phoenix referring to amounts Phoenix claimed were due or becoming due for payment to them. Krantz Vol. 1, 134:1-10, Exh. 243.

Plaintiff's Response: Undisputed.

[3]In response Phoenix provided a list of 45 invoices that it wanted to be approved for payment.

65. Then on December 7, 2012, Ms. Krantz received another email from a representative of Phoenix referring to invoices that Phoenix claimed had been outstanding for more than 90 days, and amounts Phoenix was claiming were overdue for payment to it. Krantz Vol. 1, 135:1-14. Exh. 245.

Plaintiff's Response: Undisputed.

66. On December 7, 2012, Ms. Krantz received an email from the G4S Project Manager, Scott Mailman, asking her to "please assist in every way possible to make this go away," referring, as she understood, to the problem of the unpaid invoices that Phoenix was claiming they wanted to get paid. Krantz Vol. 1, 138:17-24, 139:1-5; Exh. 246.

Plaintiff's Response: Undisputed.

67. Ms. Krantz wrote back to Mr. Mailman on that same day, that she had sent the invoices treasury and "HAVE NOT received a response at all," referring to the G4S Treasury Department responsible for paying bills. Krantz Vol. 1, 139:6-16.

Plaintiff's Response: Undisputed.

68. In a further exchange of emails with Mr. Mailman, Ms. Krantz informed him, on December 12, 2012, that $66,975.36 was past due to Phoenix at that time. Krantz Vol. 1, 141:1-24, 142:1-5, 17-23. As of December 15, 2012, that $66,975 amount was overdue for payment to Phoenix by G4S. .Krantz Vol. 1, 144:12-14.

Plaintiff's Response: Disputed. G4S incorporates its response to paragraph 25. Furthermore, G4S disputes MTC's claim that the $66,975.36 was overdue for payment to Phoenix as of December 15, 2012. On occasion, G4S had to reject entire invoices because the work being invoiced for was not complete. Krantz Aff., ¶ 26. As an example, G4S rejected numerous invoices submitted by Phoenix in 2012 due to incomplete work. Id. As a result, the

processing of invoices were delayed. Id. Specifically, on September 26, 2012, G4S sent Phoenix a letter rejecting 65 invoices due to incomplete work and requesting that Phoenix void the invoices, see Krantz Aff., ¶ 26, Exhibit M, and a second letter on October 8, 2012, rejecting an additional 6 invoices. See id., Exhibit N. On December 3, 2012, Ms. Krantz responded to a Phoenix request for payment information and in her reply, she requested that Phoenix identify the voided invoices that they would like G4S to approve. See Krantz Aff., ¶ 27, Exhibit O. After receipt and review of the Phoenix list of invoices, Ms. Krantz communicated with the G4S Treasury Department's Risk Manager on December 12, 2012 and informed him that she was processing $66,975.36 for payment. See id., Exhibit P. After additional review, G4S approved and agreed to pay $138,687.73 and Phoenix, in its December 14, 2012 communication to the G4S Treasurer, agreed to extend the time for payment to January 3, 2013. See id., Exhibit Q.

69. That amount was not actually paid to Phoenix by G4S until January 2013. 145:2-9; Exh. 209, p. 64 of 99. Accordingly, throughout December 2012, these were amounts that were past due to Phoenix that had not yet been paid. Krantz Vol. 1, 145:10-13.

Plaintiff's Response: Disputed. G4S incorporates its response to paragraph 25. Furthermore, G4S disputes MTC's claim that the $66,975.36 was overdue for payment to Phoenix throughout December 2012. On occasion, G4S had to reject entire invoices because the work being invoiced for was not complete. Krantz Aff., ¶ 26. As an example, G4S rejected numerous invoices submitted by Phoenix in 2012 due to incomplete work. Id. As a result, the processing of invoices was delayed. Id. Specifically, on September 26, 2012, G4S sent Phoenix a letter rejecting 65 invoices due to incomplete work and requesting that Phoenix void the invoices, see Krantz Aff., ¶ 26, Exhibit M, and a second letter on October 8, 2012, rejecting an additional 6 invoices. See id., Exhibit N. On December 3, 2012, Ms. Krantz responded to a

Phoenix request for payment information and in her reply, she requested that Phoenix identify the voided invoices that they would like G4S to approve. See Krantz Aff., ¶ 27, Exhibit O. After receipt and review of the Phoenix list of invoices, Ms. Krantz communicated with the G4S Treasury Department's Risk Manager on December 12, 2012 and informed him that she was processing $66,975.36 for payment. See id., Exhibit P. After additional review, G4S approved and agreed to pay $138,687.73 and Phoenix, in its December 14, 2012 communication to the G4S Treasurer, agreed to extend the time for payment to January 3, 2013. See id., Exhibit Q.

70. But twice in December 2012, in connection with two separate invoices that were submitted to MassTech at that time, G4S falsely represented to MassTech in payment release certifications that it had paid its subcontractors all amounts owed to them through the dates of those certifications even though Phoenix had not been paid all the amounts G4S owed it at those times. Krantz Vol. 1, 145:16-24 (Q. "But in Exhibit 250, **G4S nevertheless represented that all subcontractors had been paid all amounts due them, even though Phoenix had not been paid all amounts due them, correct? A. Correct.**"); Krantz Vol. 1, 146:1-6 ("**G4S also represented in Exhibit 251, the payment release executed on December 21, 2012, that all subcontractors had been paid all amounts due them up to the date of this certification, even though Phoenix had not been paid all the amounts owed, correct? A. Correct.**"), Exhs. 250, 251. The two G4S invoices to MassTech in connection with which these false payment release certifications were made totaled requests for payment by G4S to MassTech of almost a million dollars. Krantz Vol. 1, 146:7-11.

Plaintiff's Response: Disputed. The December 2012 payment release certifications signed on December 15 and December 21, 2012, did not make false representations to MTC. MTC's claim that $66,975.36 was overdue for payment to Phoenix throughout December 2012 is

141. Mr. Lasala executed the releases in good faith and believed she was acting in conformity with all applicable laws. See Lasala Aff., ¶ 5.

Defendant's Response: Disputed. *See* Deposition Testimony and Deposition Exhibits cited in *Defendant's Motion to Strike the Affidavits of G4S Deponents Dusseault, Krantz and Lasala* (filed herewith); and *Defendants Motion to Strike Portions of the Affidavits of Subcontractors* (filed herewith). *See, also e.g.*, Krantz Dep., Vol. 2, 69:8-14. Also the cited portion of the Lasala Affidavit does not state what is written in Statement 141.

142. The Project is complete. In fact, on or about January 20, 2015, MTC issued the "Certificate of Final Completion of Work." See a true and correct copy of the "Certificate of Final Completion of Work" executed by Philip H. Holahan, MTC's Deputy Executive Director and General Counsel, on behalf of MTC on January 20, 2015. See Krantz Aff., ¶ 4, Exhibit A.

Defendant's Response: Undisputed that on or about January 20, 2015, MTC issued the "Certificate of Final Completion of Work."

143. G4S paid its subcontractors in full for the work they performed on the Project. See Krantz Aff., ¶ 5.

Defendant's Response: Disputed. *See* Deposition Testimony and Deposition Exhibits cited in *Defendant's Motion to Strike the Affidavits of G4S Deponents Dusseault, Krantz and Lasala* (filed herewith); and *Defendants Motion to Strike Portions of the Affidavits of Subcontractors* (filed herewith). *See, also e.g.*, See Krantz Dep., Vol. 1-2.

144. None of G4S' subcontractors filed a lien on the Project. See Krantz Aff., ¶ 6.

Defendant's Response: Undisputed.

145. G4S' subcontractors did not stop work, reduce crews, or slow the work due to payment issues on the Project. *See* Deposition Testimony and Deposition Exhibits cited in *Defendant's Motion to Strike the Affidavits of G4S Deponents Dusseault, Krantz and Lasala* (filed herewith); and *Defendants Motion to Strike Portions of the Affidavits of Subcontractors* (filed herewith). *See, also e.g.*, See Krantz Aff., ¶ 7.

Defendant's Response: Disputed. Supplemental Affidavit of Eileen Pellerin Attaching Deposition Exhibits ("Suppl. Pellerin Aff.") at Exhs, 170, 174, 176, 268, 284, 361, 407, 519, 521-523. Also the cited portion of the Krantz Affidavit only states only that Ms. Krantz was "not aware of" such circumstances, not that they did not occur.

146. As the Contracts Manager, Ms. Krantz was generally aware of when invoices were received, when they were approved and the period of time after which an approved invoice would become due. Every invoice had different due dates for payment. See Krantz Aff., ¶ 8.

Defendant's Response: Undisputed, except disputed that every invoice had different due dates for payment. *See* Def. Exh. 208-209.

147. On August 21, 2015, and August 22, 2015, Ms. Krantz sat for a videotaped deposition in this matter pursuant to a Notice served by counsel for MTC. See Krantz Aff., ¶ 9.

Defendant's Response: Undisputed.

148. Prior to her deposition, Ms. Krantz had not reviewed the accounts payable history on the Project consisting of 7,754 invoices submitted to G4S between June 2011 and December 2014 as well as many thousands of electronically stored communications. See Krantz Aff., ¶ 11.

Defendant's Response: Disputed. See Krantz, Vol. 1 31:16-18; 34:2-11. *See also* Deposition Testimony and Deposition Exhibits cited in *Defendant's Motion to Strike the*

Affidavits of G4S Deponents Dusseault, Krantz and Lasala (filed herewith); and *Defendants Motion to Strike Portions of the Affidavits of Subcontractors* (filed herewith).

149. The invoices and accounts payable chart (Ex. 209) Ms. Krantz was shown at her deposition do not accurately reflect the due dates and payment terms of many invoices submitted on the Project. See Krantz, Vol. 1 38:7-20; 43:23-45:5.

Defendant's Response: Disputed. See Krantz Dep., Vol. 1 52:11-17. *See also* Deposition Testimony and Deposition Exhibits cited in *Defendant's Motion to Strike the Affidavits of G4S Deponents Dusseault, Krantz and Lasala* (filed herewith); and *Defendants Motion to Strike Portions of the Affidavits of Subcontractors* (filed herewith).

150. The Project consisted of the construction and installation of over 1,200 miles of fiber-optic cable through 1,200 facilities in 123 western and central Massachusetts communities. Krantz Aff. ¶ 13. The Project involved newly constructed aerial, buried and underground fiber-optic cable sites, with connections to 24 points of interconnection ("POIs") and over 800 customer anchor institutions ("CAIs") at 1,000 unique locations. Id.

Defendant's Response: Undisputed, except as to the opinions "custom" and "unique."

151. Given the complicated nature of the Project, the adherence to the technical specifications was critical and the work included in each subcontractor invoice had to be physically inspected. Id. at ¶ 14. In addition, all documentation required to be submitted with pay applications by subcontractors had to be reviewed for compliance with the specifications. Id.

Defendant's Response: Disputed. *See* Deposition Testimony and Deposition Exhibits cited in *Defendant's Motion to Strike the Affidavits of G4S Deponents Dusseault, Krantz*

and Lasala (filed herewith); and *Defendants Motion to Strike Portions of the Affidavits of Subcontractors* (filed herewith). Undisputed that the Krantz Aff. states this opinion.

152. The agreed upon timeframes for the payment of invoices by G4S varied subcontractor by subcontractor. Id. at ¶ 15.

Defendant's Response: Disputed. Krantz Dep., Vol. 1, p. 58:12-18. Timeframes were generally either Net 30 days, Net 45 days, or "Pay When Paid."

153. For example, on or about June 7, 2013, Tower Resource Management ("TRM") agreed to accept payment beyond the 45-day period. See the email dated June 7, 2013 from Mike Shinner, the Controller for TRM, Krantz Aff., ¶ 17, Exhibit B (Ms. Krantz: "[The invoices] are ok and will be paid July 1. Thanks for your understanding;" Mr. Shinner: "No problemo have a good weekend"). Accordingly, payment was made in full on July 1, 2013, in accordance with the agreed upon payment date. Id.

Defendant's Response: Disputed. Payment was already past due, and TRM had no choice but to receive it late. Krantz Dep., Vol. 1, pp. 112-114, Dep. Exh. 231., pp. 72-78; Leland Aff. at Exh. A (TRM subcontract) at Exh. B, § 1.0 (Prime Contract Flow Down Provisions") *and* Contract (Docket No. 7) at p. MTC 00041, Article 11.8.1 (terms "may not be changed, altered, or amended in any way except in writing signed by a duly authorized representative of each party."). *See* Deposition Testimony and Deposition Exhibits cited in *Defendant's Motion to Strike the Affidavits of G4S Deponents Dusseault, Krantz and Lasala* (filed herewith); and *Defendants Motion to Strike Portions of the Affidavits of Subcontractors* (filed herewith).

Krantz and Lasala (filed herewith); and *Defendants Motion to Strike Portions of the Affidavits of Subcontractors* (filed herewith).

156. G4S's subcontractors never stopped work, reduced their workforce, or filed a lien on the Project. See Krantz Aff. ¶¶ 6-7; Leland Aff. ¶¶ 9, 11-12; Stephens Aff. ¶¶ 10, 12-13; Eagan Aff. ¶¶ 9, 11-12; McVeigh Aff. ¶¶ 9, 11-12; Annese Aff. ¶¶ 8, 10-11.

Defendant's Response: Disputed. *See, e.g.*, Krantz Dep. Vol. 2, pp. 7-25, Dep. Exh. 267-269. Suppl Pellerin Aff. at Exhs. at Exhs, 170, 174, 176, 268, 284, 361, 407, 519, 521-523.

157. Pursuant to the terms of the Contract, each Application for Payment was required to be accompanied by a "Design-Builder Progress Payment Release", and a "Design Consultant and Subcontractor Progress Payment Releases", in the form attached to the Contract as Exhibit B-2, for each design consultant and subcontractor on the Project. See Krantz Aff., ¶ 19, Exhibit D. These releases contained a waiver by the subcontractor of any claims regarding payment for work, labor, material, or service on the Project. See Contract, Exhibit B-2. These releases also contained a certification by the subcontractor that its laborers, trade subcontractors, and others had been paid in full as of the date of the release. See id.

Defendant's Response: Disputed. *See* Deposition Testimony and Deposition Exhibits cited in *Defendant's Motion to Strike the Affidavits of G4S Deponents Dusseault, Krantz and Lasala* (filed herewith); and *Defendants Motion to Strike Portions of the Affidavits of Subcontractors* (filed herewith). Except undisputed that each Application for Payment was required to be accompanied by a "Design-Builder Progress Payment Release," otherwise disputed. See Krantz Dep. Vol. 1.

158. G4S routinely obtained executed "Design Consultant and Subcontractor Progress Payment Releases" from its design consultants and subcontractors on the Project. Krantz Aff., ¶ 20, Exhibit E.

Defendant's Response: Disputed. *See* Deposition Testimony and Deposition Exhibits cited in *Defendant's Motion to Strike the Affidavits of G4S Deponents Dusseault, Krantz and Lasala* (filed herewith); and *Defendants Motion to Strike Portions of the Affidavits of Subcontractors* (filed herewith).

159. MTC did not request and G4S did not submit the executed "Design Consultant and Subcontractor Progress Payment Releases" with each of G4S' Applications for Payment. Krantz Aff., ¶ 21.

Defendant's Response: Disputed. *See* Deposition Testimony and Deposition Exhibits cited in *Defendant's Motion to Strike the Affidavits of G4S Deponents Dusseault, Krantz and Lasala* (filed herewith); and *Defendants Motion to Strike Portions of the Affidavits of Subcontractors* (filed herewith). Docket No. 7 (Contract) requested such release.

160. G4S did submit "Final Design Consultant and Subcontractor Releases," in the form attached to the Contract as Exhibit C-2, with its Application for Final Payment. Krantz Aff., ¶ 22.

Defendant's Response: Disputed. G4S submitted some, but not all of the Final Design Consultant and Subcontractor Releases.

161. In the course of the Project, G4S made agreements with subcontractors regarding the payment of certain invoices that varied the payment terms of their subcontract. Krantz Aff., ¶ 16.

Also the Krantz Affidavit is not admissible on these issues. . *See also* Deposition Testimony and Deposition Exhibits cited in *Defendant's Motion to Strike the Affidavits of G4S Deponents Dusseault, Krantz and Lasala* (filed herewith); and *Defendants Motion to Strike Portions of the Affidavits of Subcontractors* (filed herewith).

169. On a number of occasions, G4S had to reject entire invoices because the work being invoiced for was not complete. Krantz Aff., ¶ 26. As an example, G4S rejected numerous invoices submitted by Phoenix in 2012 due to incomplete work. Id. As a result, the processing of invoices was delayed. Id. Specifically, on September 26, 2012, G4S sent Phoenix a letter rejecting 65 invoices due to incomplete work and requesting that Phoenix void the invoices, see Krantz Aff., ¶ 26, Exhibit M, and a second letter on October 8, 2012, rejecting an additional 6 invoices. See id., Exhibit N.

Defendant's Response: Disputed. G4S repeatedly and intentionally failed to pay its subcontractors past due amounts that it owed them. Krantz Dep. Vol. 2, pp. 8-20, Exh. 269-270. Also the Krantz Affidavit is not admissible on these issues, and the referenced September 26, 2012 letter from G4S to Phoenix stated that G4S unilaterally "deems these invoices to be void." . *See also* Deposition Testimony and Deposition Exhibits cited in *Defendant's Motion to Strike the Affidavits of G4S Deponents Dusseault, Krantz and Lasala* (filed herewith); and *Defendants Motion to Strike Portions of the Affidavits of Subcontractors* (filed herewith).

170. On December 3, 2012, Ms. Krantz responded to a Phoenix request for payment information and in her reply, she requested that Phoenix identify the voided invoices that they

Defendant's Response: Disputed. *See* Deposition Testimony and Deposition Exhibits cited in *Defendant's Motion to Strike the Affidavits of G4S Deponents Dusseault, Krantz and Lasala* (filed herewith); and *Defendants Motion to Strike Portions of the Affidavits of Subcontractors* (filed herewith). *See*, Eagan Aff.. at Exh. B, § 1.0 (Prime Contract Flow Down Provisions") *and* Contract (Docket No. 7) at p. MTC 00041, Article 11.8.1 (terms "may not be changed, altered, or amended in any way except in writing signed by a duly authorized representative of each party.")

190. As is common practice in the construction industry, and consistent with the course of conduct on this Project, payments are commonly issued after the date specified by the terms of payment in a subcontract. See Annese Aff., ¶¶ 6-7; Eagan Aff., ¶¶ 6-7; Stephens Aff., ¶¶ 6,8; McVeigh Aff., ¶¶ 6-7; Leland Aff., ¶¶ 6-7. In fact, in on multiple occasions, subcontractors agreed with G4S to modify the subcontract payment schedule with regard to many of the subcontractor invoices disputed herein, See Krantz Aff., ¶¶ 17, 18; Leland Aff., ¶ 8; Stephens Aff., ¶ 7, and in the absence of such an agreement, subcontractors understood that payments may be received from G4S after the payment period specified in the subcontract. See Annese Aff., ¶ 6; Eagan Aff., ¶ 6; Stephens Aff., ¶ 6; McVeigh Aff., ¶ 6; Leland Aff., ¶ 6. Furthermore, the Certificate of Final Completion was issued for the Project on or about January 20, 2015, all subcontractor invoices were paid in full, no liens were filed on the Project, and none of G4S' subcontractors stopped work, reduced crew, or slowed work due to payment issues on the Project. See Krantz Aff., ¶¶ 4-7.

Defendant's Response: Disputed. *See* Deposition Testimony and Deposition Exhibits cited in *Defendant's Motion to Strike the Affidavits of G4S Deponents Dusseault, Krantz and Lasala* (filed herewith); and *Defendants Motion to Strike Portions of the Affidavits of*

6

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS SUPERIOR COURT

G4S TECHNOLOGY LLC, Plaintiff, v. MASSACHUSETTS TECHNOLOGY PARK CORPORATION, Defendant.	CIVIL ACTION NO. 14-02998-BLS

AFFIDAVIT OF STEVEN WENGERT IN SUPPORT OF MOTION OF DEFENDANT MASSACHUSETTS TECHNOLOGY PARK CORPORATION FOR SUMMARY JUDGMENT AS TO ITS COUNTERCLAIMS

I, Steven Wengert, being duly sworn, do hereby depose and state that:

1. I am a technology project management expert with Tilson Technology Management, LLC, Portland, Maine, and from 2011 to the present have served as the Owner's Project Manager for the Massachusetts Technology Park Corporation d/b/a MassBroadband Institute ("MassTech") on a 1,000 mile fiber optic network expansion project in Western Massachusetts called the MassBroadband123 Project (the "Project").

2. I hold a Master of Business Administration ("MBA") from Southern New Hampshire University, which I received in 2006, a Bachelor of Science ("B.S.") degree in Accounting from New Hampshire College, which I received in 1996, and was Certified in Nuclear and Electrical Engineering by the Naval Nuclear Power Plant Program in 1986. I am also certified by and a member of the Project Management Institute ("PMP").

3. In my role as the Owner's Project Manager, I was responsible for, among other things, managing Tilson's review and approval of the various invoices submitted throughout the course of the Project by MassTech's design builder for the Project, G4S Technology LLC ("G4S").

4. The process for reviewing and approving the invoices submitted by G4S began when G4S submitted a draft invoice to Tilson's accounting office. Individuals in Tilson's accounting office would review the draft invoice to ensure that the G4S payment certification was included with the draft invoice package and that the cost information included in the invoice accurately reflected previous invoices submitted by G4S and paid by MassTech.

5. Attached hereto at Exhibits 4A through 63A are true and accurate copies of the payment certifications G4S submitted with each of the invoices paid by MassTech throughout the course of the Project. The payment certifications were an essential component of the G4S invoice because they were required by the Contract and certified that G4S had paid its subcontractors, vendors and suppliers all amounts due them up to the date of the certification. I relied upon the truthfulness of these certifications when I provided my approval of G4S's invoices to MassTech. I would not have approved any G4S invoice that did not contain the required payment certification.

6. Attached hereto at Exhibits 4D through 63D are true and accurate copies of the summary pages from each of the G4S invoices approved by Tilson and paid by MassTech.

7. After the Tilson accounting office completed their review of the G4S invoice, other individuals at Tilson with knowledge of the status of the work on the Project would confirm that the items included in the invoice were at the level of completion indicated in the invoice. Following this review, I would approve the invoice and then the finance team at Tilson

would compile an invoice package consisting of a cover letter from Tilson, the G4S invoice, any cost detail backup and the payment certification from G4S. The invoice package would then be sent to MassTech for further approval and payment.

8. Over the last several months, I performed an analysis of Tilson timesheets related to Tilson invoices submitted to MassTech in order to determine the charges by Tilson for reviewing the various invoices submitted by G4S over the course of the Project. In order to perform this analysis, I reviewed Tilson's timesheets for the Project between August 2013 and December 2013, which in my opinion provides timesheets reasonably representative of the effort associated with reviewing G4S's invoices over the course of the entire Project. In each of the Tilson timesheets, I was able to identify line times that included the work associated with reviewing G4S's invoices and the amounts subsequently charged to MassTech for this work. Since Tilson's timesheets can include several activities on each line item, based upon my experience reviewing G4S's invoices and overseeing the review process on behalf of Tilson, I also determined to a reasonable degree of certainty, on a line-by-line basis the percentage of the total time included on each line for the G4S invoice review. I then extrapolated the total time spent reviewing G4S's invoices for the entire Project based upon the average time spent reviewing the G4S invoices during the five month period. It is my opinion to a reasonable degree of certainty that, over the course of the entire Project, MassTech paid Tilson at least approximately $37,601.25 for Tilson's review of G4S's invoices, which represents approximately eighteen hours of time spent by Tilson reviewing G4S invoices every month. Attached hereto as Exhibit 68 is a compilation of the extracts from the timesheets between August 2013 and December 2013 as well as the calculation of: (i) the average time spent per

month; (ii) the associated average charges to MassTech per month; and (iii) the extrapolation of the total cost to review the G4S invoices over the course of the Project.

Sworn to under the pains and penalties of perjury this 18 day of 20, 2016

Steve Wengert

CERTIFICATE OF SERVICE

I, Robert J. Kaler, hereby certify that a copy of this document was served by ~~electronic mail~~ hand on counsel for the respondents on this 16th day of June, 2016.

Robert J. Kaler

7

PREFACE

The recipient and any subrecipients must, in addition to the assurances made as part of the application, comply and require each of its contractors and subcontractors employed in the completion of the project to comply with all applicable statutes, regulations, executive orders (EOs), Office of Management and Budget (OMB) circulars, terms and conditions, and approved applications.

This award is subject to the laws and regulations of the United States. Any inconsistency or conflict in terms and conditions specified in the award will be resolved according to the following order of precedence: public laws, regulations, applicable notices published in the Federal Register, EOs, OMB circulars, Department of Commerce (DOC) Financial Assistance Standard Terms and Conditions, agency standard award conditions (if any), and special award conditions. Special award conditions may amend or take precedence over DOC standard terms and conditions, on a case-by-case basis, when allowed by the DOC standard term and condition.

Some of the DOC terms and conditions herein contain, by reference or substance, a summary of the pertinent statutes, or regulations published in the Federal Register or Code of Federal Regulations (CFR), EOs, OMB circulars or the assurances (Forms SF-424B, 424D). To the extent that it is a summary, such provision is not in derogation of, or an amendment to, any such statute, regulation, EO, or OMB circular.

A. FINANCIAL REQUIREMENTS

.01 Financial Reports

a. The recipient shall submit a "Financial Status Report" (SF-269) on a semi-annual basis for the periods ending March 31 and September 30, or any portion thereof, unless otherwise specified in a special award condition. Reports are due no later than 30 days following the end of each reporting period. A final SF-269 shall be submitted within 90 days after the expiration date of the award.

b. The reports must be submitted to the Grants Officer in hard copy (no more than an original and two copies), or electronically when specified in the special award conditions.

.02 Award Payments

a. The advance method of payment shall be authorized unless otherwise specified in a special award condition. The Grants Officer determines the appropriate method of payment. Payments will be made through electronic funds transfers directly to the

recipient's bank account and in accordance with the requirements of the Debt Collection Improvement Act of 1996 and the Cash Management Improvement Act. The DOC Award Number must be included on all payment-related correspondence, information, and forms.

b. When the "Request for Advance or Reimbursement" (SF-270) is used to request payment, the recipient shall submit the request no more frequently than monthly, and advances shall be approved for periods to cover only expenses anticipated over the next 30 days. When the SF-270 is used, the recipient must complete the SF-3881, "ACH Vendor Miscellaneous Payment Enrollment Form," and return it to the Grants Officer.

c. Unless otherwise provided for in the award terms, payments under this award will be made using the Department of Treasury's Automated Standard Application for Payment (ASAP) system. Under the ASAP system, payments are made through preauthorized electronic funds transfers, in accordance with the requirements of the Debt Collection Improvement Act of 1996. In order to receive payments under ASAP, recipients are required to enroll with the Department of Treasury, Financial Management Service, Regional Financial Centers, which allows them to use the on-line and Voice Response System (VRS) method of withdrawing funds from their ASAP established accounts. The following information will be required to make withdrawals under ASAP: (1) ASAP account number – the award number found on the cover sheet of the award; (2) Agency Location Code (ALC); and Region Code. Recipients enrolled in the ASAP system do not need to submit a "Request for Advance or Reimbursement" (SF-270), for payments relating to their award. Awards paid under the ASAP system will contain a special award condition, clause, or provision describing enrollment requirements and any controls or withdrawal limits set in the ASAP system.

d. Advances shall be limited to the minimum amounts necessary to meet immediate disbursement needs, but in no case should advances exceed the amount of cash required for a 30-day period. Advanced funds not disbursed in a timely manner and any applicable interest must be promptly returned to DOC. If a recipient demonstrates an unwillingness or inability to establish procedures which will minimize the time elapsing between the transfer of funds and disbursement or if the recipient otherwise fails to continue to qualify for the advance method of payment, the Grants Officer may change the method of payment to reimbursement only.

.03 Federal and Non-Federal Sharing

a. Awards which include Federal and non-Federal sharing incorporate a budget consisting of shared allowable costs. If actual allowable costs are less than the total approved budget, the Federal and non-Federal cost shares shall be calculated by applying the approved Federal and non-Federal cost share ratios to actual allowable costs. If actual allowable costs are greater than the total approved budget, the Federal

8

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS SUPERIOR COURT

G4S TECHNOLOGY LLC, Plaintiff, v. MASSACHUSETTS TECHNOLOGY PARK CORPORATION, Defendant.	)	CIVIL ACTION NO. 14-02998-BLS

SUPERIOR COURT RULE 9A STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION OF DEFENDANT MASSACHUSETTS TECHNOLOGY PARK CORPORATION FOR SUMMARY JUDGMENT AS TO ITS COUNTERCLAIMS

Defendant Massachusetts Technology Park Corporation ("MTPC") respectfully submits this Superior Court Rule 9A Statement of Undisputed Material Facts in support of its Motion for Summary Judgment as to Counterclaims filed herewith. Set forth below are the materials facts relied upon by MTPC in support of that motion, and the responses of plaintiff G4S Technology LLC ("G4S") thereto.

1. MTPC "is a public instrumentality of the Commonwealth of Massachusetts." Complaint at 1. MTPC "was awarded $45.4 million in federal funding to build MassBroadband123, a 1,200-mile fiber optic network intended to bring high-speed Internet access" to areas of western Massachusetts (the "Project"). Id. MTPC was also given substantial state funding for the Project. MTPC "put the Project out to public bid"; and "selected G4S as the Design-Builder" of the Project. Id. A design-build contract pursuant to which G4S was to design and build the Project "was executed by MTPC and G4S, dated June 30, 2011" (the "Contract"). Id. at p. 2.

See, e.g. Pellerin Aff. Ex. 4A (emphasis supplied).

DEFENDANT'S RESPONSE: Disputed in part. Undisputed that G4S was required to submit a progress payment release form with each invoice it submitted to MTPC for payment representing and warranting that G4S had paid in full all amounts owed to subcontractors, and to the extent they were "pay when paid" contracts, that it would use the money from MassTech to pay those subcontractors promptly, Lasala Dep. at 128:10-128:17, and that the form read in part:

> The undersigned hereby represents and warrants that all subcontractors, suppliers and equipment providers of the undersigned have been paid in full all amounts due to them up to the date of this Certification, and that the sums received in payment for the Amount Requested shall be used to forthwith pay in full all amounts due to such subcontractors, suppliers and equipment providers up to the date hereof, excluding only the value of any Pending Changes and Disputed Claims submitted in accordance with the General Conditions of the Contract.

Pellerin Aff., Ex. 4A. Disputed that this certificate was submitted "as just one of many," see Wengert Aff., or that the language in it was boldfaced or italicized in the manner above, id., or that it meant anything other than what G4S's VP Mr. Lasala admitted it meant. Lasala Dep. at 128:10-128:17.

103. At the conclusion of the project, MTPC continued to withhold $4,030,647.21 of the original contract price based on alleged delays and workmanship defects. Davis Aff. Ex. 77 (2/11/15 Notice of Withholding). This amount was never paid to G4S.

DEFENDANT'S RESPONSE: Disputed in part. Undisputed that during and at the conclusion of the Project, MTPC withheld $4,030,747 for the reasons and on the grounds stated in its Notices of Withholding, including indemnification under the Contract for costs incurred by MTPC to identify and/or correct or complete defective or incomplete G4S work. Disputed that the withholding was for "alleged delays," because it was for undisputed actual delays in the

completion of the Project for which G4S had agreed to pay liquidated damages in Article 4 of the Contract, see Docket No. 7 (Appendix to Motion to Dismiss) at p. MTC000004.

The Claims of the Parties

104. After the project concluded, G4S filed suit to seek payment of the remaining contract price plus an additional $10 million it claimed it was owed for completing the Project. See gen Complaint (Docket No. 1); Davis Aff. Ex. 78 (9/10/14 letter from Lasala to Wengert) p. 1.

DEFENDANT'S RESPONSE: Disputed in part. Undisputed that in September of 2014, G4S filed suit seeking to recover the amounts identified in its Complaint, which speaks for itself. See Complaint. Disputed that G4S sought in the Complaint to recover an additional "it claimed it was owed for completing the project," because it claimed that amount based on allegations that delays in completing the project had cost it more money, and that it was entitled to an "equitable adjustment" of the Contract price, under the provisions of the Contract, on account of that. Id.

105. MTPC counterclaimed asserting various claims which sought direct damages for alleged wrongful conduct of G4S. See gen. Answer and Counterclaims (Docket No. 11). MTPC has not sought indemnification for third-party claims. Id.

DEFENDANT'S RESPONSE: Disputed in part. Undisputed that in 2015, G4S filed Counterclaim in response to G4S's Complaint, which speaks for itself, and sought damages for wrongful conduct by G4S, id., and indemnification for all losses incurred by MTPC on account of that wrongful conduct. Id. Disputed that it only sought "direct damages."

G4S Alternative Calculations

9

Volume I
Pages: 1-65
Exhibits: 0

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

****
G4S TECHNOLOGY LLC *
Plaintiff *
v. * DOCKET NUMBER 1484CV02998
*
MASS TECHNOLOGY PARK CORP *
Defendant *
****

HEARING
BEFORE THE HONORABLE JANET L. SANDERS

APPEARANCES:
For the Plaintiff:
Hinckley, Allen and Snyder
28 State Street
Boston, Massachusetts 02109
By: Joel Lewin, Esq.

Todd and Weld
One Federal Street
Boston, Massachusetts 02110
By: Christopher Weld, Esq.
Megan Deluhery, Esq.

For the Defendant:
Holland and Knight
10 Saint James Avenue
Boston, Massachusetts 02116
By: Robert J. Kaler, Esq.
Edwin Latham Hall, Esq.

Boston, Massachusetts
September 27, 2016

Recording produced by digital audio recording system. Transcript produced by Approved Court Transcriber, Donna Holmes Dominguez

THE COURT: -- things that have been going on.

MR. WELD: I --

THE COURT: Because -- I mean and I will say this right off the bat just so we're clear.

I made a decision. I did realize that the consequences of it were particularly harsh. I think that's been one of the reasons you're very concerned with this, very harsh.

I've thought about that. I've looked at these cases. They're -- the cases seem to say what they said. They were old.

You know, frankly I couldn't find any particularly -- I certainly couldn't find anything to indicate the rules have changed.

Some of these rules seem to have dated back a hundred years, and there was nothing that seemed to indicate they'd changed.

On the other hand, I was concerned. And -- and -- and I -- I did the best -- did the best I could. I am wondering and I wondered it at the time whether the SJC or the Appeals Court would agree with me.

So I do think there is a legitimate issue that I was wrong.

So that said, I am, you know, sympathetic to your desire to get a ruling on this, but I don't really -- I -- I was struggling with how I do this given all this action that's going to be occurring around the very certifications that were

10

Volume I
Pages: 1-82
Exhibits: 0

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

****
G4S TECHNOLOGY LLC *
Plaintiff *
*
v. * DOCKET NUMBER SUCV2014-02998
*
MASS TECHNOLOGY PARK CORP *
Defendant *
*
****

HEARING
BEFORE THE HONORABLE JANET L. SANDERS

APPEARANCES:
For the Plaintiff:
Hinckley, Allen and Snyder
28 State Street
Boston, Massachusetts 02109
By: Joel Lewin, Esq.
Rhian M. J. Cull, Esq.

For the Defendant:
Holland and Knight
10 Saint James Avenue
Boston, Massachusetts 02116
By: Robert J. Kaler, Esq.
Edwin Latham Hall, Esq.

Boston, Massachusetts
December 21, 2015

Recording produced by digital audio recording system. Transcript produced by Approved Court Transcriber, Donna Holmes

you would like to make?

MR. LEWIN: Your Honor -- the only --

THE COURT: So I -- what I'm hearing is that there's -- it's an -- there's equitable considerations here. That there's a huge forfeiture that's being sought that there -- the -- to the extent there -- the -- the plaintiff or the defendant's case is relying on testimony which was the product of leading questions and tightly controlled answer -- presentations, that -- and if I look at the affidavits, it fills out the picture to show that there was good faith.

And moreover, it was not clearly a violation of the subcontractor's contracts since they had either agreed to the payments or they were -- and I guess ultimately all of these people were paid.

So that if I look at the case law, it -- it's not a material breach, and it doesn't deprive MTC of anything particularly critical or important to the bargain that was struck.

MR. LEWIN: Correct.

THE COURT: Is that kind of a good summary --

MR. LEWIN: I couldn't have said it -- I couldn't have said it better.

THE COURT: Okay. I'm going to take this under advisement.

I've -- I've heard an hour and a half of arguments, and I've read the briefs a couple of times.

11

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
BUSINESS LITIGATION SESSION 2

G4S TECHNOLOGY LLC, Plaintiff, v. MASSACHUSETTS TECHNOLOGY PARK CORPORATION, Defendant.	CIVIL ACTION NO. 14-02998-BLS2

AFFIDAVIT OF RHIAN M.J. CULL IN SUPPORT OF PLAINTIFF'S RULE 56(F) APPLICATION

I, Rhian M.J. Cull, having been duly sworn, hereby depose and state as follows:

1. I am an attorney admitted to practice in the Commonwealth of Massachusetts, and a partner in the law firm of Hinckley, Allen & Snyder LLP, counsel for Plaintiff, G4S Technology LLC ("G4S").

2. I have personal knowledge of the facts described herein, which facts I believe to be true.

3. I submit this affidavit in support of Plaintiff G4S Technology LLC's ("G4S") Application for Relief Pursuant to Rule 56(f) of the Massachusetts Rules of Civil Procedure and in opposition to Defendant Massachusetts Technology Park Corporation's ("MTC") Motion for Summary Judgment, dated September 11, 2015 (the "Motion").

4. The Motion should be denied or continued because discovery in this matter is ongoing and G4S has not had sufficient opportunity to develop the factual record with respect to MTC's knowledge of G4S's alleged failure to timely pay the subcontractors identified in the

Motion, whether MTC suffered any injury as a result of the breaches alleged in the Motion, and whether MTC exercised or waived its contractual right to require G4S to submit payment releases from G4S's subcontractors.

5. On June 1, 2015, this Court entered an Amendment to the Tracking Order setting a deadline of January 31, 2016 for the completion of factual discovery. The parties have three months remaining to complete fact discovery.

6. On February 3, 2015, G4S served MTC with its First Request for the Production of Documents under Mass R. Civ. P. 34.

7. On April 3, 2015, MTC served its Objections and Responses to G4S's First Request for the Production of Documents under Mass R. Civ. P. 34.

8. G4S has served its First Set of Interrogatories on MTC. On October 19, 2015, MTC served its answers to Interrogatories Nos. 1 and 2, but answers to the remaining Interrogatories Nos. 3 through 38 are due by November 12, 2015 in accordance with Mass. R. Civ. P. 33.

9. MTC's most recent document production was on October 16, 2015. While G4S has produced well over one terabyte of Electronically Stored Information so far in this matter, MTC is yet to produce any documents relating to the damages purportedly suffered by MTC on the Project or that support the Notices of Withholding dated August 15, 2014 and February 11, 2015 pursuant to which MTC withheld payment from G4S.

10. In light of the significant volume of documents and data, and the deficiencies in MTC's productions, G4S requires additional time to search and review MTC's productions to develop the factual record necessary to oppose the Motion.

11. On August 31, 2015, G4S noticed the depositions of the following eight MTC employees, former employees, and consultants: Christopher B. Andrews; Cornell Robinson; Elizabeth Copeland; Donna Baron; Herb Nickels; Steve Wengert; Judy Dumont; and Pamela Goldberg.

12. To date, G4S has taken the deposition of only two of these deponents, Elizabeth Copeland and Donna Baron. Neither of these depositions is concluded. The remaining six depositions are currently scheduled to take place in October and November of this year. G4S also intends to notice additional MTC employees, former employees and consultants.

13. G4S also intends to notice a deposition of MTC pursuant to Rule 30(b)(6) of the Massachusetts Rules of Civil Procedure.

14. G4S is entitled to take these depositions and additional depositions of witnesses not yet noticed to develop the factual record necessary to oppose the Motion.

15. Specifically, G4S is entitled to depose MTC's witnesses on the critical questions of whether MTC knew of G4S's alleged failure to timely pay the subcontractors identified in the Motion, whether MTC suffered any injury as a result of the breaches alleged in the Motion, and whether MTC exercised or waived its contractual right to require G4S to submit payment releases from G4S's subcontractors.

16. It is expected that additional depositions will be noticed as information and records continue to be produced, both by the parties and third-parties, and the complicated facts pertaining to the parties' respective claims are uncovered.

17. As set forth in G4S's Rule 9A Statement in Opposition to the Motion, G4S has identified documents indicating that at least one of MTC's other contractors, Axia NGNetworks USA, Inc. ("Axia"), was required pursuant to an agreement between MTC and Axia to timely

pay its vendors and subcontractors, that Axia did not timely pay certain of its vendors and subcontractors, that MTC knew that Axia did not timely pay certain of its vendors and subcontractors, and that Axia certified that it had timely paid each of its vendors and subcontractors.

18. Axia was a network operator for MTC responsible for the Acceptance Testing Plan of the network for the Project.

19. In addition to the outstanding discovery with respect to MTC, G4S served third-party subpoenas *duces tecum* and *ad testifandum* upon Axia on September 30, 2015, and Booz Allen Hamilton, a consultant for the National Telecommunications and Information Administration ("NTIA") of the US Department of Commerce on the Project, on August 13, 2015.

20. Axia has begun its production of documents in response to the subpoena served on it, but has not completed its production of responsive documents.

21. The Axia deposition is scheduled to take place in November of this year.

22. Booz Allen has objected to the subpoena issued to it and has refused to produce any documents in response to provide a witness to testify on its behalf. The parties continue to meet and confer.

23. G4S is entitled to take these depositions to further develop the factual record necessary to oppose the Motion.

24. Accordingly, the Motion should be denied or continued pursuant to Rule 56(f).

Further Your Affiant Sayeth Not.

SIGNED UNDER THE PENALTIES OF PERJURY THIS 20th DAY OF October, 2015.

Rhian M.J. Cull

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2015, a true and correct copy of the foregoing document was served by First Class and electronic mail upon counsel of record.

12

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 14-02998-BLS2

G4S TECHNOLOGY LLC,

Plaintiff,

v.

MASSACHUSETTS TECHNOLOGY PARK CORPORATION,

Defendant.

AFFIDAVIT OF SHEILA BURKE

I, Sheila Burke, having been duly sworn, hereby depose and state as follows:

1. I am a resident of the Commonwealth of Massachusetts, and a civil engineer. I have been providing consulting services to counsel for G4S relating to the defendant's claim for lost interest damages.

2. I have reviewed the affidavits and supporting exhibits attached to the Affidavit of Frank Jaffe and submitted by the defendant, Massachusetts Technology Park Collaborative ("MTPC") in this action. In particular, I have reviewed Exhibits 4C through 63C and the calculation of interest damages submitted by MTPC in Exhibit 66 attached to the Affidavit of Frank Jaffe, as well as the explanation of the calculation provided in Mr. Jaffe's Affidavit. In connection with my review of the defendant's calculation, I performed alternative calculations which are summarized on Exhibit 1 attached hereto. The backup calculations to this summary are contained in the CD attached hereto as Exhibit 2.

SUMMARY OF LOST INTEREST CALCULATIONS

3. MTPC presented a single calculation which it described as approximating the benefit G4S obtained from prematurely paid amounts. MTPC claimed an amount of $1,673,159.15 as the benefit G4S obtained from premature payments. Affidavit of Frank Jaffe ("Jaffe Aff.") at Ex. 66. In contrast, I calculated lost interest to MTPC of $1,757.48. *See* Exhibit 1, at 0.22%.

4. The difference between our calculations is MTPC took the entire amount of each G4S payment requisition identified on Exhibit 66 (60 payment requisitions totaling $38,634,622.54) and accrued interest on the full amount of each payment requisition from the date it was paid by MTPC through substantial completion. *See* Jaffe Aff. at ¶¶21-23 & Ex. 66. MTPC's calculation did not take into account the dollar amount of any purportedly overdue vendor invoices as of the date a G4S payment requisition was submitted to MTPC. MTPC also did not take into account the number of days each such vendor invoice was overdue, that is, the number of days between the date payment was due and the date payment was made.

5. In my calculation, rather than calculating lost interest on the entire amount of each of the 60 G4S payment requisitions, I calculated the lost interest on only the specific vendor invoices that MTPC asserted were late. I accepted MTPC's assertion as to the amount of the overdue vendor invoice as well as its assertion as to the number of days payment was overdue as reflected in the exhibits to Mr. Jaffe's Affidavit. *See* Jaffe Aff. Exs. 4C-63C. Rather than calculating interest on 60 G4S payment requisitions totaling $38,634,622.54, I calculated lost interest on the allegedly late vendor invoices identified in Mr. Jaffe's exhibits totaling $15,985,583.51, and only for the period of time each vendor invoice was overdue.

6. I also calculated lost interest at the average rate at which MTPC asserted it earned interest on deposited funds during the applicable period (0.22%), *see* Erlandson Aff. ¶12 & Ex. 64, rather than the Prime rate (3.25%) used in Mr. Jaffe's calculation. Making these two adjustments, I calculated an amount of $4,087.16.

7. Finally, based on prior submissions of MTPC, I determined that 43% of the disputed amounts paid to G4S derived from state sources, with the remaining 57% being federal funds. Specifically, Mr. Jaffe had previously done two calculations of "lost interest" damages for MTPC, one which determined an amount including federal funds and one which excluded federal funds. In order to isolate the amount at issue which derived from only state funds, I divided the "Total of Payments" from Mr. Jaffe's ***prior*** Exhibit 67 of $16,776,943.53 by the "Total of Payments" from Mr. Jaffe's ***prior*** Exhibit 66 of $38,634,622.54 to determine the percentage of the total of the 60 requisitions paid to G4S which represented state funds: 43%. I then applied this percentage to the total interest calculation I performed to determine the amount of interest attributable to state funds at the 0.22% rate: $1,757.48. Mr. Jaffe's prior Exhibits 66 and 67 are attached here as Exhibits C and D, respectively.

8. I was also asked to isolate the impact of each of the above changes to MTPC's analysis. As a result, I performed the same calculation MTPC performed, utilizing MTPC's actual experienced average rate of return on deposited funds (0.22%) instead of the Prime rate. Making only this change in MTPC's analysis reduces the amount MTPC claims is at issue from $1.67 million to $113,260.

9. Calculating interest on just the invoices MTPC identified as late for the period of time they were overdue, but still utilizing the Prime rate (3.25%) reduces the amount MTPC claims is at issue from $1.67 million to $60,289.61. *See* Ex. A.

10. Finally, using MTPC's calculation but backing out federal funds (multiplying the total claimed amount by 43%) reduces the amount at issue from $1.67 million to $719,458.43.

11. As set out herein, combining these adjustments (reducing the interest rate, calculating the rate on only overdue invoices for the period of time they were overdue, and backing out federal funds), results in a "lost interest" calculation of $1,757.48.

EXPLANATION OF EXHIBITS AND METHODOLOGY

12. The results of my work are reflected in Exhibit A, and the backup to this work is contained on the CD supplied as Exhibit B.

13. Exhibit B containing my backup work in order to apply the interest rate to each invoice for only the period of time it was overdue is reflected on separate tabs in my excel workbook named "Revised Interest Calculation at 3.25% 10 19 16". Each tab corresponds to a G4S requisition and the information used to populate each tab derived from an Exhibit attached to Mr. Jaffe's affidavit. The tabs in the workbook are named to correspond to the Exhibit to Mr. Jaffe's affidavit which provided the source data. For example, tab 1 of the workbook is named "4C", tab 2 is named "5C", tab 3 is named "6C" and so on. There is a tab corresponding to each of the Exhibits 4C through 63C from Mr. Jaffe's affidavit, except where the underlying invoices were entirely duplicative, as I removed duplicative invoices as set out below.

14. In the spreadsheet tab named "4C", the first column contains "Line #" which corresponds to Mr. Jaffe's "Exh. 208 Line #" in Exhibit 4C attached to his affidavit. The second column contains the "Vendor Name" which is also populated using the information contained in the same column from Mr. Jaffe's Exhibit 4C.

15. In the "4C" tab, there then appear three columns titled "Document Date", "Due Date" and "Paid Date", each of which were populated using the information contained in the columns of the same title in Mr. Jaffe's Exhibit 4C.

16. Tab "4C" then contains a column titled "Total Days Late" which is the difference between the "Due Date" and "Paid Date" columns which were populated using the information from Mr. Jaffe's Exhibit 4C. Accepting the "Due Date" and "Paid Date" as accurate for purposes of my work, and accepting each vendor invoice identified by Mr. Jaffe, this column represents how many days "late" the payment for each vendor invoice was when paid.

17. The next column in tab "4C" has the "Invoice Paid Amount", again, a figure taken directly from Mr. Jaffe's Exhibit 4C column with the same heading for each invoice.

18. Tab "4C" then has two columns representing the calculations I was asked to perform for each vendor invoice. The first column, titled "Interest 3.25%" used a 3.25% annual interest rate, divided by 365 days to determine the daily rate (as Mr. Jaffe did, *see* Jaffe Aff. at ¶23), and then applied that daily rate to the Invoice Paid Amount for the Total Days Late to arrive at the calculation appearing in this column for each vendor invoice in tab "4C". The second column, titled "Avg. 30-Day Yield Interest", used the 0.22% annual interest rate, the average rate atwhich MTPC actually earned interest on funds in its bank account, as set out in paragraph 6 above. . Again, I divided this by 365 days to determine the daily rate and then applied that daily rate to the Invoice Paid Amount for the Total Days Late to arrive at the calculation appearing in this column for each vendor invoice.

19. At the bottom row on tab "4C" appears the totals for the columns "Invoice Paid Amount" which represents the total of the vendor invoices which MTPC asserts were past due in Mr. Jaffe's Exhibit 4C, and then also totals for the columns "Interest 3.25%" and "Avg. 30-Day

Yield Interest" representing the total of the interest calculations performed for the vendor invoices appearing in this tab of the workbook.

20. I then carried these three totals from tab "4C" over to the summary appearing at the end of the excel workbook. The sum total interest calculations from "4C" appear on the line associated with G4S Invoice No. 4, identified in the first column of the summary titled "Exhibit No." As a result, my Exhibit B attached hereto shows, for G4S Invoice No. 4 (the first row in Exhibit 1), the total "Invoice Value" associated with those vendor invoices identified by Mr. Jaffe as being overdue in his Exhibit 4C, and then the total "Interest @ 3.25%" on these amounts as calculated and summed in tab 4C and the total "MTC 30 Day Yield (average) Interest @ .22%" as calculated and summed in tab 4C.

21. I performed this identical process for each of the Exhibits 5C through 63C attached to Mr. Jaffe's affidavit in tabs named "5C" through "63C" in the excel workbook submitted on the disc supplied as Exhibit B hereto. I made one modification to eliminate duplicative invoices as I populated tabs 5C through 63C to the extent that a vendor invoice had already appeared in a prior Exhibit attached to Mr. Jaffe's affidavit and was already contained in a prior tab in my workbook. For example, the invoice associated with Line # 2898 for KGP Logistics, Inc. in the amount of $1,193.53 appeared in both Exhibits 4C and 5C attached to Mr. Jaffe's affidavit. In order to avoid duplication of the interest calculations I performed, this vendor invoice appears in tab "4C" in my spreadsheet and is not repeated in my tab "5C". In this way, I included each of the vendor invoices identified in the Exhibits to Mr. Jaffe's affidavit the first time the invoice appeared and did not repeat them in subsequent tabs. I found in some instances there were no unique invoices on Mr. Jaffe's Exhibits, and consequently there is no

corresponding tab in my workbook in those cases, and only dashes in the summary spreadsheet attached as the last tab to the spreadsheet in my Exhibit B for that G4S requisition number.

22. Some city and town invoices listed by Mr. Jaffe were not listed by me in tabs "4C" through "63C" because these invoices contained no payment terms.[1] In order to more closely mirror Mr. Jaffe's assumptions, I updated my calculations reflected on Exhibit A to include these city and town invoices, with the same due date and paid date information from Mr. Jaffe's exhibits, and I have included these totals in the summary figures appearing on my Exhibit A and summarized above. These invoices accounted for $1,942.71 in the total attributable to all source funds (state and federal) at the 3.25% rate and $131.51 at the MTPC rate of 0.22%. Again, these figures are included in the totals appearing in my Exhibit A. The backup work is on Exhibit B as the workbook named "Revised Interest Calculation at 3.25% for City and Town Invoices 10 19 16".

23. The results of the tab level calculations from tabs "4C" through "63C" (except where there were no unique vendor invoices as discussed above) appear in Exhibit B associated with each of the 60 G4S requisitions identified by Mr. Jaffe in his Exhibit 66, such that for each requisition, Exhibit B shows only the total amounts associated with vendor invoices Mr. Jaffe identified as late, and then sets out the totals of the interest calculations for those vendor invoices based on the various rates as set out herein. As set out above, I also added back in interest calculations associated with those city and town invoices which had no payment terms, assuming the correctness of the date information contained in Mr. Jaffe's exhibits.

24. As explained in paragraph 7 above, in order to determine how much of this interest calculation was associated with state funds, as opposed to federal funds, I multiplied the

[1] I understand G4S takes the position that an invoice with no payment terms was not overdue since a due date could not be determined.

the "MTC 30 Day Yield (average) Interest at .22%" by the percentage I obtained (43%) when I divided the total payments attributed to state funds from Mr. Jaffe's *prior* Exhibit 67 by the total payments attributed to all G4S requisitions from Mr. Jaffe's *prior* Exhibit 66, as Mr. Jaffe had intended to perform a calculation on only state funds in the 60 payment requisitions at issue in the calculation he performed in his prior Exhibit 67. Applying this rate to only the vendor invoices that were late for the period of time they were late produced an amount of $1,757.48.

SIGNED UNDER THE PENALTIES OF PERJURY THIS 20 DAY OF OCTOBER, 2016.

SHEILA BURKE